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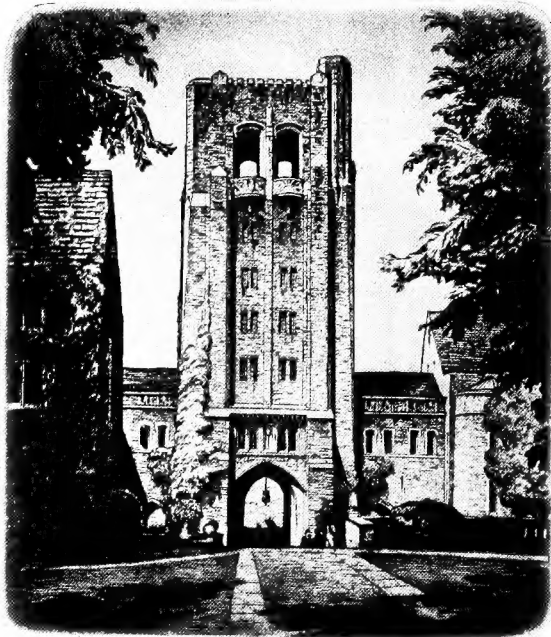


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HUGHES' POCKET DIGEST

of

EVIDENCE

By

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Member of the law faculty of the University of Michigan for six years. Member of the law faculty of the University of Illinois twelve years. Member of the law faculty of Louisiana State University two years. Dean of the College of Law of the University of Florida three years

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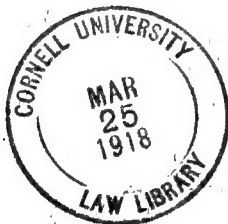
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ERRATA

Second word in sec. 19 on page 51, "~~inadmissible~~," should be admissible.

Last word in last line of text on page 116, "~~inadmissible~~," should be admissible.

Seventh word in first line on page 469, "~~vendor~~," should be vendee.

Fourth word in fifth line of text from bottom on page 513, "~~competent~~," should be incompetent.



Thos. W. Hughes

In Loving Memory
This Book
Is
Affectionately Inscribed
To
My Sainted Wife
Jennie Hughes

COMMENTS ON

"Hughes On Evidence"

FOR STUDENTS.

Published by
Callaghan & Company

"I used this text in the class room last year and continue its use this year. I think it is the best work on this topic for class instruction, in print. It brings the rules of evidence out with great clearness and precision."

J. W. GREEN,
Dean University of Kansas Law School.

"I know of no clearer definitions anywhere in any work on evidence, than those of Mr. Hughes. Clear definitions always mean clear thinking, and his work as a whole is clear, concise and correct. I know of no work on evidence that puts more that is modern and practical into the same number of pages."

ADELBERT MOOT,
Buffalo, N. Y.

"Hughes of the University of Illinois has written an extremely good book for students and I advise all of you to study it." (To his class in evidence.)

JOHN C. GRAY,
Harvard Law School.

"The author has taught the subject of evidence for fourteen years, six in the University of Michigan and eight in the University of Illinois, and comes well equipped to discuss questions in this branch of jurisprudence. It cannot be questioned that this work possesses a high degree of excellence and merits the strongest commendation." (1916.)

AMERICAN LAWYER.

PREFACE

The aim of the author in writing this volume has been to produce a *practical* book for the use of trial lawyers and judges. An attempt has been made to state clearly and succinctly the rules of evidence and their exceptions as laid down by the courts of last resort. Theorizing and philosophizing have been studiously avoided. Thruout the book numerous apt illustrations are given, and, very generally, propositions are supported by apt citations.

The arrangement of the various divisions and subdivisions of the book is practically similar to that of "Thayer's Cases On Evidence" and "Hughes On Evidence." There are five Parts. Part I deals with certain preliminary topics not peculiar to the law of Evidence. Part II deals with the leading principles and rules of exclusion. This Part comprises a large field of the law of Evidence. Part III treats of Real Evidence. Part IV of Documentary Evidence and Part V of Witnesses. This arrangement is a logical one and it has received much favorable comment.

Each of the five Parts is subdivided into topics, each with its appropriate heading, and under each heading the various propositions of law pertaining to the particular topic are succinctly stated and discussed.

The author of this volume has taught the subject of Evidence for twenty-five years. He also has written a text-book on the subject for the use of students, which is used in some twenty law schools. In his large experience in teaching law he has taught practically all the subjects of the law curriculum, and he contemplates writing a series of pocket digests of various law subjects. At present he is engaged in writing "Hughes' Pocket Digest of the Law of Contracts." The plan of the book will be similar to that of "Hughes' Pocket Digest of Evidence." It will be a *practical* book for the use of lawyers and judges. It is the expectation of the author that it will be published about next March.

Thos. W. Hughes

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PART I.

Preliminary Topics.

CHAPTER I.

Judicial Notice.

§ 1. **In general.**—The subject of judicial notice is closely allied to the law of evidence but in the strict sense it does not form a part of it. Facts which are judicially noticed do not have to be proved by evidence. The doctrine of judicial notice is that it would be unreasonable for courts to require formal proof of facts of common knowledge, or of facts which the courts, owing to their official character, are charged with knowledge or can readily ascertain. The doctrine is applicable not only to the facts in issue but also to material evidentiary facts.

Courts may take judicial notice of facts not alleged in the pleadings. They may also take judicial notice that certain alleged facts in a pleading that is demurred to are not true.

As regards facts which are judicially noticed courts may acquire information from any source. To such information the exclusionary rules of evidence do not apply.

Certain classes of facts courts are obliged to judicially notice. As regards many other facts, however, they may exercise their discretion. Public laws, matters of public interest, matters of universal notoriety and matters peculiarly

within the knowledge of the particular court **must** be judicially noticed.

§ 2. **Public laws.**—Public laws include the constitution of the United States, treaties of the United States, constitutions of the several states, public acts of congress, public statutes of the several states, international laws and the common law including the law merchant.

The federal constitution is judicially noticed by all the courts of this country, both federal and state. State constitutions are judicially noticed by the courts of their respective states and, with one exception, by the federal courts. When a case is taken from the highest court of a state to the supreme court of the United States the latter court does not take judicial notice of the public laws of the sister states. Barring this exception the supreme court of the United States takes judicial notice of the public laws of the various states of the Union. It also takes judicial notice of the federal public statutes. Treaties of this country are judicially noticed both by the federal and state courts. Treaties of foreign countries, however, are facts that must be proved. And foreign statutes must be proved in both the federal and state courts. The statutes of one state are foreign to the sister states and are not judicially noticed by the courts of the sister states. The English common law is judicially noticed by both the federal and the state courts. The common law of a state is judicially noticed by the courts of that state, but not by the courts of the

sister states. It is also judicially noticed by the federal courts, barring the one exception in the case of the federal supreme court heretofore stated. Municipal charters are judicially noticed by the courts of the state in which they operate,¹ but not by the courts of the sister states. They are also judicially noticed by the federal courts, barring the one exception heretofore stated. Municipal ordinances are judicially noticed by the courts of the municipality in which they operate² and by courts of appeal to which cases are taken from that municipality.³ The charters of railway corporations and banks are, by the weight of authority, judicially noticed. General incorporation statutes are judicially noticed but not the corporations organized under them. Special incorporation statutes are not judicially noticed unless they so provide. Private statutes are not judicially noticed. Nor are foreign corporations.

§ 3. Meaning of public laws.—Generally speaking, laws are public, as distinguished from private, when they extend to all persons within the same territorial limits.⁴ They are not necessarily private because they operate upon local sub-

1. *State v. Sherman*, 42 Mo. 210; *Smith v. Janesville*, 52 Wis. 280.

2. *Incor. Town of Scranton v. Danenbaum*, 109 Ia. 93, 80 N. W. R. 221; *Downing v. Miltonville*, 36 Kan. 740, 14 Pac. R. 281.

3. *City of Portland v. Yick*, 44 Ore. 439, 75 Pac. R. 706.

4. *Levy v. State*, 6 Ind. 284.

jects. As said in the Indiana case cited, and approvingly quoted by the federal supreme court,⁵ "Statutes incorporating counties, fixing their boundaries, establishing court-houses, canals, turnpikes, railroads, etc., for public uses, all operate upon local subjects. They are not for that reason special or private acts." In the Indiana case cited the statute in question regulated the sale of liquor in a certain locality. Courts have taken judicial notice of statutes which regulate traffic in lumber within a certain district;⁶ prohibit fishing within certain limits;⁷ fix or change city or county boundaries;⁸ establish or change a county seat;⁹ increase the jurisdiction of a certain county court.¹⁰ Public statutes have been defined as "those that relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation or by constitutional restraints."¹¹

§ 4. **Matters of public interest.**—Matters of public interest of which courts take judicial notice include matters of history; geographical features; titles and seals of foreign sovereigns; the principal state officers; heads of departments; proclamations of war and peace; sittings

5. *Unity v. Burrage*, 103 U. S. 447.

6. *Pierce v. Kimball*, 9 Me. 54.

7. *Burnham v. Webster*, 5 Mass. 266.

8. *Com. v. Springfield*, 7 Mass. 12.

9. *State ex rel. Cothren v. Lean*, 9 Wis. 279.

10. *Meshke v. Van Doren*, 16 Wis. 319.

11. *Sedgwick Stat. Const. Law. J.* 30.

of congress and of state legislatures; weights and measures; judges of the various courts, their seals and terms of court as regulated by law; foreign notaries and their seals; flags of foreign countries; ordinary public feasts and festivals; meanings of common abbreviations, etc.

§ 5. Territorial divisions.—Courts take judicial notice of the territorial extent of the nation and of the several states. Also of the division of the state into counties, towns, and cities.¹² Courts also take judicial notice of the subdivision of cities into blocks;¹³ the areas of counties,¹⁴ and their geographical situation;¹⁵ the geographical situation of towns and cities;¹⁶ the boundaries of internal revenue districts,¹⁷ and of judicial and congressional districts.¹⁸

§ 6. National and state officials.—Courts take judicial notice of public matters that concern the national and state governments.¹⁹ These include the accession and death of the principal governmental officers, including the chief magistrate of the nation or state, members of the cabinet, senators, judges, heads of bureaus,²⁰ foreign min-

12. *Grange v. Chapman*, 11 Mich. 499.

13. *Herrick v. Morill*, 37 Minn. 256, 5 Am. St. Rep. 841.

14. *Bd. of Com. v. State*, 147 Ind. 476, 48 N. E. R. 908.

15. *State v. Pennington*, 124 Mo. 388, 27 S. W. R. 1106.

16. *State v. Reader*, 60 Ia. 527.

17. *United States v. Jackson*, 104 U. S. 41.

18. *United States v. Johnson*, 2 Sawy. (U. S.) 482.

19. *Taylor v. Barclay*, 2 Sim. 21.

20. *York Ry. Co. v. Winans*, 17 How. 30.

isters, United States marshals,²¹ etc. All matters prescribed by public law are, of course, judicially noticed. These include terms of office of public officials, their functions, jurisdiction, times of election, etc.²² The principal officials of the state and nation, executive, legislative and judicial, are judicially noticed.²³

§ 7. **Official seals and signatures.**—At the English common law the seals used by public officials were judicially noticed but not their signatures.²⁴ English statutes provide, however, that their signatures shall be judicially noticed. In this country both the signatures and seals of the principal government officials are judicially noticed.²⁵ Moreover, the seals and signatures of even subordinate public officials are judicially noticed.²⁶

§ 8. **Customs and usages.**—Courts take judicial notice of general customs and usages. Thus, they judicially notice the custom of observing Sundays and the great festivals;²⁷ what is known as the law of the road in passing vehicles;²⁸ well

21. *Brown v. Piper*, 91 U. S. 37.

22. *Brown v. Piper*, *supra*; *York Ry. Co. v. Winans*, *supra*; *Hizer v. State*, 12 Ind. 330; *Fox v. Com.* 81 Pa. St. 511.

23. *People v. John*, 22 Mich. 461. See notes, 20 L. R. A. 382; 13 Am. Dec. 192.

24. *Taylor*, Evid. § 14.

25. *Dyer v. Last*, 51 Ill. 179; *Bishop v. State* 30 Ala. 34.

26. *Fox v. Com.*, *supra* (justice of the peace); *Bishop v. State*, *supra* (clerk of court).

27. *Sasser v. Farmer's Bank*, 4 Md. 409.

28. *Turley v. Thomas*, 8 C. & P. 103; *Taylor*, Ev. § 35.

known customs of railway corporations and banks;²⁹ the law merchant,³⁰ etc.

§ 9. **Matters of history.**—Courts take judicial notice of great historical events, such as the civil war; Sherman's march to the sea, etc.³¹

§ 10. **Meanings of words, phrases and abbreviations.**—Courts take judicial notice of the meaning of current words, phrases and abbreviations that are commonly understood.³² Thus, courts have taken judicial notice of the meaning of the terms "malt liquor;"³³ "whiskey;"³⁴ "squatter riot;"³⁵ "gift enterprise;"³⁶ "Beecher business;"³⁷ "C. O. D.;"³⁸ "f. o. b.;"³⁹ "to have charge of the sack;"⁴⁰ "realized the fable of the frozen snake."⁴¹ On the other hand they have

29. *Isaacson v. N. Y. Cent. Ry. Co.* 90 N. Y. 278, 46 Am. Rep. 142; *Munn v. Burch*, 25 Ill. 35.

30. *Barnett v. Brandao*, 6 M. & Gr. 630; *Sanberg v. Am. Exp. Co.*, 136 Mich. 639, 99 N. W. R. 879.

31. *Williams v. State*, 67 Ga. 260.

32. *Linck v. Kelley*, 25 Ind. 278, 87 Am. Dec. 362.

33. *Frese v. State*, 23 Fla. 267.

34. *Frese v. State*, *supra*.

35. *Clarke v. Fitch*, 41 Cal. 472.

36. *Lohman v. State*, 81 Ind. 15.

37. *Bailey v. Kal. Pub. Co.*, 40 Mich. 251.

38. *State v. Intox. Liquors*, 73 Me. 278; *contra McNichol v. Pac. Exp. Co.*, 12 Mo. App. 401.

39. *Vogt v. Schienebeck*, 122 Wis. 491.

40. *Edward v. San Jose Printing Co.*, 99 Cal. 431, 34 Pac. R. 129.

41. *Hoare v. Silverlock*, 12 Adol. & Ell. N. S. 624.

refused to take judicial notice of the meaning of the terms "quar.,"⁴² "C. B. & Q. Ry. Co."⁴³

§ 11. **Facts which invariably occur.**—Courts judicially notice events which invariably happen in the course of nature. Thus, courts have judicially noticed the recurrence of the seasons;⁴⁴ the time at which the sun and moon rise and set;⁴⁵ the courses of the planets;⁴⁶ coincidences of the days of the week and month;⁴⁷ general times of planting and harvesting;⁴⁸ laws of nature pertaining to birth;⁴⁹ average duration and expectancy of human life;⁵⁰ difference of time at two places having different longitudes.⁵¹

It is essential, however, that the events *invariably occur*. Thus, courts will not take judicial notice that cattle are liable at certain seasons of the year to communicate disease;⁵² that the age of a tree can invariably be determined by estimating the number of concentric layers in the trunk;⁵³ that lakes and streams are invariably

42. O'Connor v. Decker, 95 Wis. 202. See also note, 89 Am. Dec. 692.

43. Alcolo v. Chicago, B. & Q. Ry. Co., 70 Ia. 185.

44. Allman v. Owen, 31 Ala. 167; Wilson v. Van Leer, 127 Pa. St. 371, 14 Am. St. Rep. 854.

45. People v. Chee Kee, 61 Cal. 404.

46. Tutton v. Drake, 5 Hurl. & N. 649.

47. Sprowl v. Lawrence, 33 Ala. 673.

48. Wetzler v. Kelly, 83 Ala. 440.

49. Whitman v. State, 34 Ind. 360.

50. Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

51. Curtis v. March, 4 Jur. N. S. 1112.

52. Bradford v. Floyd, 80 Mo. 207.

53. Patterson v. McCausland, 3 Bland. (Md.) 69.

closed at certain times of the year, owing to the condition of the weather;⁵⁴ or that a certain crop of peaches matured on a certain date.⁵⁵

§ 12. Matters peculiarly within the knowledge of the particular court.—Certain facts which inherently pertain to the particular court are judicially noticed. These facts include the records of the court; its officers; its terms of court; its jurisdiction and its rules of court.

§ 13. Matters of universal notoriety.—Facts which are known to practically everybody, courts will judicially notice. This field of judicial notice is an extensive one. It includes many facts which are judicially noticed because they are also matters of public interest. Among them are various natural phenomena.

Facts whose notoriety is limited are not included in this class. As to such facts the question of taking judicial notice of them rests in the discretion of the court.

§ 14. Principles of science and art.—Principles of science and art that constitute facts of general knowledge are usually judicially noticed. Thus, courts have taken judicial notice that natural gas is an inflammable and explosive substance and that it is inherently dangerous;⁵⁶ that

54. *Haines v. Gibson*, 115 Mich. 131, 73 N. W. R. 126.

55. *Culverhouse v. Worts*, 32 Mo. App. 419.

56. *Jamieson v. Indiana Gas Co.*, 128 Ind. 555.

various liquors, such as beer,⁵⁷ gin,⁵⁸ wine,⁵⁹ whiskey,⁶⁰ apple brandy⁶¹ and blackberry brandy⁶² are intoxicating; that the use of cigarettes is deleterious to health;⁶³ that tobacco and cigars do not constitute drugs and medicines;⁶⁴ that splenetic (Texas) fever is infectious;⁶⁵ that fine coal dust is explosive.⁶⁶ On the other hand they have refused to take judicial notice that gin and turpentine are inflammable.⁶⁷ Again, one court may judicially notice what another court may refuse to judicially notice. Thus, one court has judicially noticed that kerosene oil is a refined earth oil,⁶⁸ whereas another court has refused to do so.⁶⁹

§ 15. **Jurors.**—To a limited extent the doctrine of judicial notice is applicable to jurors. Their chief function is to weigh the evidence and render their verdict accordingly. They may not use

57. *Watson v. State*, 55 Ala. 158; *Briffitt v. State*, 58 Wis. 39, 46 Am. Rep. 621.

58. *Com. v. Peckham*, 2 Gray (Mass.) 514.

59. *Caldwell v. State*, 43 Fla. 545, 30 So. 814.

60. *Schlicht v. State*, 56 Ind. 173.

61. *Thomas v. Com.* 90 Va. 92.

62. *Fenton v. State*, 100 Ind. 598.

63. *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703.

64. *Com. v. Marzynski*, 149 Mass. 68.

65. *Dorr Cattle Co. v. The Chicago, Gt. West. Ry. Co.*, 128 Ia. 359.

66. *Cherokee Coal Co. v. Wilson*, 47 Kan. 460.

67. *Mosley v. Vermont Ins. Co.*, 55 Vt. 142.

68. *Morse v. Buffalo Ins. Co.*, 30 Wis. 534.

69. *Bennett v. N. Brit. & M. Ins. Co.*, 8 Daly (N. Y.) 471.

private knowledge they may have in regard to the facts in issue, but they may take notice of and act upon matters of common knowledge the same as judges.⁷⁰ Moreover, they may act upon general practical knowledge they may have that would naturally aid them in reaching a just verdict. Thus, they may make use of such knowledge in estimating the credibility of witnesses;⁷¹ the characteristics of certain domestic animals as to their propensity to become frightened;⁷² the natural instinct of self-preservation, etc.⁷³

70. *Head v. Hargrave*, 105 U. S. 45; *Briffit v. State*, *supra*; *Com. v. Peckham*, *supra*; *State v. Maine Cent. Ry. Co.*, 86 Me. 309.

71. *Jenny Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. R. 448.

72. *State v. Maine C. R. Co.*, 86 Me. 309.

73. *Chase v. Ry. Co.*, 77 Me. 262; *Chicago & E. I. Ry. Co. v. Beaver*, 119 Ill. 34, 65 N. E. R. 144.

CHAPTER II.

Presumptions.

§ 1. **Definition.**—A presumption is an inference of the existence or nonexistence of a fact or facts from the existence or nonexistence of some other fact or facts based upon a prior experience of their connection.¹

§ 2. **Classification.**—Presumptions are of two

1. *Ins. Co. v. Weide*, 11 Wall. (N. S.) 438.

kinds—(1) Presumptions of law and (2) Presumptions of fact. Some authors add a third—Presumptions of law and fact.

Presumptions of law are subdivided into (1) disputable presumptions of law and (2) conclusive presumptions of law.

§ 3. **Attributes.**—A presumption of law is a rule of law binding on the court and jury. If disputable, it is sufficient to establish a *prima facie* case on the point involved. If conclusive, testimony is inadmissible to contradict it.² A conclusive presumption of law is in fact a rule of the substantive law.³

A presumption of fact is not a rule of law but merely circumstantial evidence.⁴ Its weight depends upon the circumstances of the particular case. The question is one for the jury to decide. Owing to the fact that this presumption is deducible from one or more facts by a natural process of reasoning, and is not governed by artificial rules like a presumption of law, it is sometimes designated a natural presumption.

Presumptions go into the scale pan and take the place of evidence. In no case, however, do they cause the burden of proof in its true sense to shift. Disputable presumptions of law, however, establish a *prima facie* case upon the point involved and in consequence shift the burden of proceeding with evidence. They do not,

2. 1 Greenleaf Ev. § 44.

3. *Brown v. Oldham*, 123 Mo. 621, 27 S. W. R. 409.

4. 1 Greenleaf Ev. § 44.

however, shift the burden of proof in its true sense.

When a disputable presumption of law has been fully met by rebuttal evidence it loses its arbitrary power. It must then be given effect according to its evidential character which must be determined in the light of reason and logic.

Presumptions operate prospectively and not retroactively.

§ 4. **Incapacity of infants.**—At common law an infant under seven years of age is conclusively presumed incapable of committing any crime.⁵ Between seven and fourteen he is also presumed incapable, but the presumption is rebuttable.⁶ If he is at least fourteen he is presumed capable.⁷ A boy under fourteen years of age is conclusively presumed incapable of committing rape.⁸ In some states, however, the presumption is rebuttable.⁹ A girl of tender years is conclusively presumed incapable of consenting to sexual intercourse. The age is usually fixed by statute. It varies in the several states from ten to eighteen. In Queen Elizabeth's reign an act was passed fixing it at ten years.¹⁰

5. Reg. v. Smith, 1 Cox Cr. Cas. 260.

6. Reg. v. Smith, *supra*.

7. Reg. v. Smith, *supra*.

8. Reg. v. Jordan, 9 Car. & P. 118; McKinny v. State, 29 Fla. 565, 10 So. 732, 30 Am. St. Rep. 140.

9. Com. v. Green, 2 Pick. (Mass.) 380; Gordon v. State, 93 Ga. 531, 21 S. E. R. 54, 44 Am. St. Rep. 189; Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. St. Rep. 592.

10. Russ., Crimes 810.

§ 5. **Legitimacy.**—A child born in lawful wedlock, or within due time after its severance by the death of the husband or otherwise, is presumed legitimate.¹¹ The presumption arises even when the husband and wife live apart by mutual consent.¹² Ordinarily the presumption is conclusive.¹³ This is on the ground of morality and decency. When, however, the circumstances are such as to render it impossible, or even highly improbable, it may be rebutted.¹⁴ To bastardize a child, however, born in lawful wedlock, the proof must be clear and convincing.¹⁵ Testimony by the husband or wife, or declarations by them to third parties, tending to prove or disprove non-access is inadmissible.¹⁶ But testimony by the wife that she had, or did not have, intercourse with one or more men other than her husband is admissible.¹⁷ And testimony by the wife that her child was born before she was mar-

11. *Gaines v. Herman*, 24 How. (U. S.) 553; *Strode v. McGowan*; 2 *Rush* (Ky.) 621. See note 56 Am. Dec. 206.
12. *Banbury v. Peerage*, 1 Sim. & St. 153.
13. *Steph. Ev.* art. 98; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Watts v. Owens*, 62 Wis. 512.
14. *Banbury v. Peerage*, *supra*.
15. Citations in note 13; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. R. 654, 33 Am. Rep. 260; *Shuman v. Shuman*, 83 Wis. 250.
16. *Mink v. State*, 60 Wis. 583; *Shuman v. Shuman*, *supra*; *Rex v. Sourton*, 5 Adol. & Ell. 180; *Dennison v. Page*, 29 Pa. St. 420, 72 Am. Dec. 644; *Clap v. Clap*, 97 Mass. 531; *Com. v. Shepherd*, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; *People v. Overseers*, 15 Barb. (N. Y.) 286.
17. *Rex v. Luffe*, 8 East 193; *Rex v. Rook*, 1 Wils. 340.

ried is admissible. It is also permissible to show the impotency of the husband.¹⁸

§ 6. **Necessaries.**—A minor living with either or both of his parents is presumed to be properly supplied with necessities.¹⁹ And when he is supplied with necessities by his parent or guardian he is presumed not to be in need of credit.²⁰

§ 7. **Innocence.**—Persons accused of crime are presumed innocent until their guilt is established beyond a reasonable doubt. This is the most highly favored of the disputable presumptions of law.²¹

§ 8. **Knowledge.**—All persons amenable to punishment are conclusively presumed to know the law. This presumption is based upon public policy.²²

§ 9. **Custom.**—Proof that a custom has existed during the memory of man raises a conclusive presumption that it has existed immemorially. And proof that it has existed immemorially raises a conclusive presumption of its legal origin.²³

18. *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687; *Weatherford v. Weatherford*, 20 Ala. 548, 56 Am. Dec. 206 and long note.

19. *State v. Cook*, 12 Ired. (N. C.) 67; *Perrin v. Wilson*, 10 Mo. 451.

20. *Nicholsan v. Wilburn*, 13 Ga. 467.

21. *Ross v. Hunter*, 4 T. R. 33; *Taylor*, Ev. sec. 112; *Best* Ev. sec. 346.

22. *Upton v. Tribilcock*, 91 U. S. 51; *Wills v. Noyes*, 12 Pick. (Mass.) 324.

23. *Bryant v. Foot*, L. R. 2 Q. B. 161, *Thayer's Cas. Ev.* 85; *Ingraham v. Hutchinson*, 2 Conn. 584.

§ 10. **Marital relation.**—When a man and woman cohabit as husband and wife and are reputed to sustain that relation toward each other they are presumed to be legally married.²⁴ The presumption in such a case is given great weight; especially when the legitimacy of their children is involved.

§ 11. **Absent and unheard of.**—When a person has been absent for at least seven years and unheard of by those who naturally would have heard of him if living, he is presumed to be dead. This presumption is sufficient to establish a *prima facie* case upon this point but it is rebuttable.²⁵

§ 12. **Coercion.**—When a married woman commits a crime in the presence of her husband she is usually presumed to have been coerced by him.²⁶ This presumption does not arise, however, in cases of treason,²⁷ murder,²⁸ felonious wounding, keeping a bawdy house²⁹ and high-

24. 1 Bish. Mar., Div. & Sep. sec. 943; *Cargile v. Wood*, 63 Mo. 501; *Hynes v. McDermott*, *supra*; *Applegate v. Applegate*; 45 N. J. Eq. 116. See full note 57 Am. Rep. 451-463.

25. *Hyde Park v. Canton*, 130 Mass. 505; *Winship v. Conner*, 42 N. H. 341; *Com. v. Thompson*, 6 Allen 591.

26. *Rex. v. Price*, 8 Car. & P. 19; *Com. v. Neal*, 10 Mass. 152, 6 Am. Dec. 105 and long note; *State v. Miller*, 162 Mo. 253, 85 Am. St. Rep. 498; *Davis v. State*, 15 Ohio 72. 45 Am. Dec. 559.

27. *Miller v. State*, 25 Wis. 84.

28. *Miller v. State*, *supra*.

29. *State v. Bentz*, 11 Mo. 27; *Rex. v. Dixon*, 10 Mod. 335.

way robbery.³⁰ In those cases in which it arises it is rebuttable.³¹

§ 13. **Malice.**—A person who feloniously kills another by means of a deadly weapon is presumed to have acted maliciously.³²

§ 14. **Intent.**—A sane person is presumed to have intended the natural and probable consequences of his voluntary acts. Ordinarily this presumption is conclusive.³³ It is otherwise, however, in the case of crimes involving specific intent and where fraud or mistake of fact is shown.

§ 15. **Adverse user.**—Continuous adverse user of real estate for twenty years raises a conclusive presumption of title.³⁴ In some states this

30. *People v. Wright*, 8 Mich. 744; *Rex v. Torpey*, 12 Cox Cr. Cas. 45.

31. *Franklin's Appeal*, 115 Pa. St. 534, 2 Am. St. Rep. 583; *Ferguson v. Brooks*, 67 Me. 251; *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772 and note.

32. *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320; *Maher v. People*, 10 Mich. 212; *Green v. State*, 28 Miss 687; *Com. v. Drew*, 4 Mass. 391; *Oliver v. State*, 17 Ala. 587; *Murphy v. People*, 37 Ill. 447; *State v. Willis* 63 N. C. 26.

33. *Com. v. York*, 9 Metc. (Mass.) 93, 43 Am. Dec. 373; *Davis v. Markshansen*, 103 Mich. 315, 61 N. W. R. 504; *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 27 N. E. R. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; *Germania Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90, 28 Am. Rep. 113; *Ryan v. Ins. Co.* 41 Con. 168, 19 Am. Rep. 490.

34. *Wallace v. Fletcher*, 30 N. H. 434; *Rooker v. Perkins*, 14 Wis. 79; *Fletcher v. Fuller*, 120 U. S. 534 and cases cited; *Strimpfler v. Roberts*, 18 Pa. St. 283, 57 Am. Dec. 606.

time-limit has been decreased by statute. It varies in the several states.

§ 16. **Peaceful possession.**—Peaceful possession of personal property raises a presumption of ownership. Thus, peaceful possession of a bill of lading by the consignee raises a presumption of ownership in him.³⁵ And peaceful possession of a negotiable note payable to bearer or order and endorsed in blank by the payee raises a presumption of ownership.³⁶ Also when the note is not endorsed.³⁷

§ 17. **Wife's authority.**—A wife living with her husband is presumed to have authority to purchase on his credit such necessities as she may think proper.³⁸ No such presumption arises, however, where she is living apart from her husband.³⁹ In the former case the presumption may be rebutted by showing that the purchase was made on the credit of her separate estate or on that of a third party;⁴⁰ or by showing that the seller had been given due notice not to sell her

35. *Lawrence v. Minturn*, 17 How. (U. S.) 107.

36. *Rubey v. Culbertson*, 35 Ia. 264; *Collins v. Gilbert*, 94 U. S. 753; *Bachelor v. Priest*, 12 Pick. 399; *Mars v. Mars*, 27 S. C. 132.

37. *Vastine v. Wilding*, 45 Mo. 89, 100 Am. Dec. 347 and note. See full note, 17 L. R. A. 326.

38. *Freestone v. Butcher*, 9 Car. & P. 643; *Montague v. Benedict*, 3 Barn. & C. 631; 1 Bish., Mar. & Div. sec. 1197.

39. *Rea v. Durkee*, 25 Ill. 503; *Stutevant v. Starin*, 19 Wis. 268; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

40. *Carter v. Howard*, 39 Vt. 106; *Pearce v. Darrington*, 32 Ala. 227; *Weisker v. Lowenthal*, 31 Md. 413.

goods on his credit, provided that he himself had not been delinquent in supplying necessities.⁴¹

§ 18. **Continued existence.**—Proof of the existence of a thing at a given time raises a presumption of its continued existence.⁴² And proof that a person was living at a given time raises a presumption of continuance of life.⁴³ This presumption arises even when the person's health is very bad.⁴⁴ The presumption is rebuttable, however, by either direct or circumstantial evidence.⁴⁵

§ 19. **Contributory negligence.**—A child of tender years is presumed incapable of contributory negligence. The age varies according to the precocity of the child. The cases show that it may arise where the child is not more than seven years of age.⁴⁶

§ 20. **Time of payment.**—In the absence of agreement as to time of payment, a presumption arises that goods sold are to be paid for on delivery.

41. 1 Bish. Mar. & Div., sec. 1196.

42. *State v. Chittenden*, 127 Wis. 468; *Berrenberg v. City of Boston*, 137 Mass. 231, 50 Am. Rep. 296 and long note; *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389, 32 Am. Dec. 220.

43. *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. R. 1088; *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486.

44. *In re Hall*, 1 Wall. Jr. (U. S.) 85.

45. Taylor Ev. (10th ed.) sec. 198.

46. *Chicago Ry. Co. v. Ryan*, 131 Ill. 474; *Kay v. Penn. Ry. Co.* 65 Pa. St. 269; *Norfolk Ry. Co. v. Ormsby*, 27 Gratt, (Va.) 455; *Gardner v. Grace*, 1 Fost. & F. 359.

§ 21. **Order of payment.**—Payment of a subsequent debt raises a presumption that all prior debts which are due have been paid.⁴⁷ And a receipt for the last installment of a debt raises a presumption that all prior installments have been paid.

§ 22. **Receipt of letters and telegrams.**—Letters properly addressed, stamped and mailed are presumed to reach their destination in due time.⁴⁸ A similar presumption arises in the case of telegrams.⁴⁹

§ 23. **Authority of agents.**—When agents of a private corporation act within the apparent scope of their authority a presumption arises that their acts are authorized by all necessary formalities. Thus, meetings of the corporation are presumed to have been regularly held.

§ 24. **Identity of persons.**—Presumptions of identity of persons sometimes arise from identity of names. Their weight depends upon circumstances. Similarity of occupation, place of abode, age, etc., are material. Much depends upon whether the name is a very common one or an unusual one.⁵⁰ In the former case the presump-

47. *Attleborough v. Middleborough*, 10 Pick. 378; *Decker v. Livingston*, 15 Johns. (N. Y.) 479.

48. *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221; *Briggs v. Hervey*, 130 Mass. 186; *Schutz v. Jordan*, 141 U. S. 213.

49. *Oregon Steamship Co.*, *supra*.

50. *Sanberg v. State*, 113 Wis. 578; *Smith v. Henderson*, 9 M. & W. 798.

tion is very weak if it arises at all. No presumption arises in any case where it would establish an inconsistent relation.⁵¹

§ 25. **Parental control.**—A minor is presumed to be under parental control and not emancipated unless there is proof to the contrary.⁵²

§ 26. **Suppressing testimony.**—Testimony which is suppressed, where a duty to produce it exists, is presumed to be unfavorable to the party who withholds it.⁵³

§ 27. **Destroying a document.**—A person who wilfully destroys documentary testimony is presumed to do so fraudulently; and unless he shows a legal excuse for the act he is estopped from introducing secondary testimony of the context of the document.⁵⁴

§ 28. **Attempted flight.**—Attempted flight by a person accused of crime raises a presumption of fact of his guilt.

§ 29. **Resulting trust.**—When an agent, with his principal's consent, purchases real estate with the latter's money and takes title in his own name, a presumption arises that he holds the legal title in trust for his principal.

51. *Goodell v. Hibbard*, 32 Mich. 48; *Jones v. Jones*, 9 M. & W. 75.

52. *Fitzwilliam v. Troy*, 6 N. H. 166. See note, 18 Am. St. Rep 652.

53. *Ccle v. Lake Shore Ry Co.*, 95 Mich. 77; *State v. Rodman*, 62 Ia. 456; *Rice v. Com.* 102 Pa. St. 408; *Crescent City Ins. Co. v. Ermaun*, 36 La. Ann. 841.

54. *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Eldridge v. Hawley*, 115 Mass. 410.

§ 30. **Character of homicide.**—When the question is whether a particular death was suicidal or accidental a presumption exists, in the absence of evidence, that it was accidental.

§ 31. **Attempt to bribe.**—If one of the parties to a suit attempts to bribe a witness his act raises a presumption of fact that his case is unjust.

§ 32. **Destroys ships papers.**—If, in time of war, the officers of a neutral ship destroy her papers in anticipation of search a strong presumption of fact arises that their purpose in doing so was to get rid of incriminating testimony.

§ 33. **Sanity.**—Ordinarily people are sane. Based upon this fact a person is presumed sane unless there is proof to the contrary.⁵⁵ Even in a criminal case the presumption is sufficient to establish *prima facie* the defendant's sanity.⁵⁶ It may, of course, be rebutted by evidence. The very important question then arises upon whom is the burden of proof in its primary and true sense? This question is discussed in the next chapter.

When a person is proved to be insane he is presumed to continue insane until the contrary is shown.⁵⁷

§ 34. **Survivorship.**—By the civil law if two or more persons lose their lives in a common disaster a presumption of survivorship arises based

55. *Staples v. Wellington*, 58 Me. 453.

56. *State v. Pike*, 49 N. H. 399, 443, 6 Am. Rep. 533.

57. *Thornton v. Appleton*, 29 Me. 298.

upon age, sex and health.⁵⁸ A person between fifteen and sixty years of age is presumed to have survived longer than one less than fifteen or more than sixty. A man is presumed to have survived longer than a woman; and a person in good health longer than a person in poor health. At common law, however, there is no presumption of law in such cases. The question of survivorship depends upon the peculiar facts and circumstances of the case and the burden of proving it rests upon the party who alleges it.⁵⁹

§ 35. **Conflicting presumptions.**—When two presumptions conflict the stronger one will, of course, prevail. Thus, the presumption of innocence, which is a very strong one,⁶⁰ will prevail over the presumption of continuance of life,⁶¹ or the presumption of chastity of a woman, or the presumption of marriage arising from cohabitation and repute.⁶²

The relative weight of conflicting presumptions is for the court to decide.

58. 1 Greenleaf Ev. sec. 29.

59. *Wing v. Angrave*, 8 H. L. Cas. 183; *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; *Will of Abram Ehle*, 73 Wis. 445; *Cowman v. Rogers*, 73 Md. 403; *Petition of Wilbor*, 20 R. I. 176, 37 Atl. R. 634, 79 Am. St. Rep. 842.

60. *Dunlop v. United States*, 165 U. S. 486, 602.

61. *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105; *Price v. Price*, 124 N. Y. 589; *Charles v. Charles*, 41 Minn. 201; *Dickerson v. Brown*, 49 Miss. 357.

62. *Clayton v. Wardell*, 4 N. Y. 230.

CHAPTER III.

Burden of Proof.

§ 1. **Definition.**—It is important to observe at the outset that the term “burden of proof” is used in two distinct senses. In its primary sense it means the duty of establishing one’s case. In its secondary sense it means the duty of going forward with evidence. This double sense in which the term is used has given rise to much confusion in the cases.¹

§ 2. **Shifting of the burden of proof.**—In its primary sense the burden of proof never shifts.² In its secondary sense, however, it may shift repeatedly during the trial.³

§ 3. **Upon whom it rests.**—In its primary sense the burden of proof lies upon the party against whom the judgment of the court should be rendered if no evidence were introduced on either side.⁴ In its secondary sense it lies, at any given time, upon the party against whom the judgment should be rendered if no more testimony were introduced.

1. Thayer’s Preliminary Treatise on Ev. 355 *et seq.*; Supreme Tent v. Stensland, 206 Ill. 124, 99 Am. St. Rep. 137.
2. Wilder v. Cowles, 100 Mass. 487; Tennessee Coal, Iron & Ry. Co. v. Hamilton, 100 Ala. 252; Lafayette v. Wortman, 107 Ind. 404; Ingals v. Eaton, 25 Mich. 32; Heineman v. Heard, 62 N. Y. 448; Powers v. Russell, 13 Pick. (Mass.) 69, 76, 77.
3. Scott v. Wood, 81 Cal. 398, 22 Pac. R. 871.
4. Farmers’ Loan & Trust Co. v. Siefke, 144 N. Y. 354, 39 N. E. R. 358.

§ 4. **Form and nature of the pleadings.**—The burden of proof in its primary sense usually depends upon the form and nature of the pleadings. As a general rule it rests upon the party who substantially-alleges the affirmative. It is to be observed, however, that an allegation may be affirmative in substance and effect and also in a sense negative.⁵

§ 5. **Rule when particular facts are peculiarly within the knowledge of a party.**—When facts material to the issue lie solely within the knowledge of one of the parties the burden is upon him to prove them. A common illustration of this rule is prosecution for selling intoxicating liquor or doing other acts without the license required by law. In Massachusetts this rule is statutory.⁶

§ 6. **Effect of presumptions.**—Presumptions do not change the burden of proof in its primary sense. A disputable presumption of law, however, being sufficient to establish a *prima facie* case upon the point involved, shifts the burden

5. *Abrath v. Northeastern Ry. Co.* 11 Q. B. D. 440, 457; *Phipps v. Mahon*, 141 Mass. 471, 5 N. E. R. 835; *Starrett v. Mullen*, 148 Mass. 570, 20 N. E. R. 178, 2 L. R. A. 697; *Ames v. Snider*, 69 Ill. 376; *Com. v. Locke*, 114 Mass. 288, 294; *Lenig v. Eisenhart*, 127 Pa. 59, 17 Atl. 684; *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307.

6. *Com. v. Curran*, 119 Mass. 206; *Hepler v. State*, 58 Wis. 46; *State v. Nye*, 32 Kan. 201; *State v. Kuhuke*, 26 Kan. 405; *State v. Richison*, 45 Mo. 575.

of proof in its secondary sense of proceeding with evidence.⁷

§ 7. **Burden of proof in criminal cases.**—When a person is on trial in a criminal case the burden is on the state to prove his guilt beyond a reasonable doubt. And, according to the English rule, when a criminal act is material to the issue in a *civil* case it must be shown beyond a reasonable doubt. By the great weight of authority, however, in this country it is sufficient in such a case to prove it by a preponderance of the evidence.⁹

§ 8. **Insanity a defense to a criminal charge.**—The two essential elements of a common-law crime are criminal intent and overt act. To establish the guilt of the accused both must be shown, and the burden of doing so is on the state.

A person who is insane, owing to a diseased mind, is incapable of entertaining a criminal intent. In pleading insanity the accused denies an essential element of the crime charged. His plea is purely a negative one. In no sense is it affirmative. Hence, logically, the burden of proof, in its primary sense, is on the state. This view is sustained by many courts.¹⁰

7. *Abrath v. Northeastern Ry Co.*, *supra*; *Quock Ting v. United States*, 140 U. S. 417.

8. *Davis v. State*, 54 Neb. 177, 74 N. W. R. 599; *Com. v. Webster*, 5 Cush. 320, 52 Am. Dec. 711; *State v. Newton*, 39 Wash. 491, 81 Pac. R. 1002.

9. *People v. Briggs*, 114 N. Y. 56.

10. *Com. v. Gerade*, 145 Pa. St. 289, 27 Am. St. Rep. 689, *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Peake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408 and note;

On the other hand, many courts hold that the burden of proof in its primary sense is on the accused.¹¹ This view, however, is erroneous. It is based on the presumption of sanity. While this presumption is sufficient to establish a *prima facie* case on the question of sanity, and in consequence shifts the burden of proof in its secondary sense, it does not shift the burden of proof in its primary and true sense. As said by Chief Justice Cooley. "There is no such thing in law as a separation of the ingredients of the offense so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden shifts in these cases is unphilosophical and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent."¹²

§ 9. **Insanity in civil cases.**—With one exception, when insanity is set up, either as a defense

State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Snider v. State, 56 Neb. 304, 76 N. W. R. 574; State v. Crawford, 11 Kan. 32; State v. Jones, 64 Ia. 349; Davis v. United States, 160 U. S. 469 (thorough discussion).

11. State v. Lawrence, 57 Me. 574; Coyle v. Com., 100 Pa. St. 573, 45 Am. Rep. 397; Ford v. State, 71 Ala. 385; Dejarnette v. Com. 75 Va. 869; State v. Hoyt, 47 Conn. 518.

12. People v. Garbutt, *supra*.

to a civil action or as a ground for maintaining it, the burden of proof is upon the party who asserts it.¹³ The one exception to this rule is where insanity of the testator is interposed as a defense to the probate of his will. As to the question of burden of proof in this case the courts are in hopeless conflict. Many of them hold that it rests on the proponent thruout the case,¹⁴ while many others hold that it shifts to the contestant after the formal proofs are made by the proponent.¹⁵

§ 10. **Negligence in general.**—As a general rule, when negligence of the defendant is the issue in a civil action the burden of proof is on the plaintiff.¹⁶ There are, however, several exceptions to this rule.

13. *Brown v. Brown*, 39 Mich. 792; *Weed v. Mut. Life Ins. Co.*, 70 N. Y. 561; *Nonnemacher v. Nonnemacher*, 159 Pa. St. 634; *Youn v. Lamont*, 56 Minn. 216; *Wright v. Wright*, 139 Mass. 177.
14. *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524; *Layman's Will*, 40 Minn. 371; *Evans v. Arnold*, 52 Ga. 169; *Barnes v. Barnes*, 66 Me. 286; *McGinness v. Kempsey*, 27 Mich. 363; *Delafield v. Parish*, 25 N. Y. 9; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682. See note L. R. A. 494.
15. *Allen v. Griffin*, 69 Wis. 529; *Eastes v. Montgomery*, 93 Ala. 293; *McDaniel v. Crosby*, 19 Ark. 533; *Grubbs v. McDonald*, 91 Pa. St. 236; *Wilbur v. Wilbur*, 129 Ill. 392. See full discussion in note, 31 Am. St. Rep. 681, *et seq.*
16. *Marshall v. Wellwood*, 38 N. J. L. 339, 20 Am. Rep. 394; *Huff v. Austin*, 102 Ind. 435; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530.

§ 11. **Negligence of common carriers.**—In an action against a common carrier by a passenger for personal injuries caused by negligence of the defendant the plaintiff establishes a *prima facie* case by showing that the injuries complained of were received by him without fault on his part while a passenger owing to failure of the machinery, or some mismanagement on the part of the carrier or his agents or servants. He is not required to prove the specific defect or mismanagement. As said in an English case, "There must be reasonable evidence of negligence; but where the thing is under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."¹⁷ The basis of this rule is the peculiar relation which exists between the passenger and the carrier and the contract to carry the former safely. In the absence of such contract the rule is otherwise. In such case the burden is on the plaintiff to show

17. *Scott v. London Dock Co.*, 3 Hurl & Co. 595. See also *Smith v. St. Paul City Ry Co.*, 32 Minn. 1; *Toledo Ry. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Ala. Ry. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65 and note; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 26 Am. St. Rep. 325 and note containing full discussion; *Le Blanc v. Sweet*, 107 La. 355, 31 So. 766, 90 Am. St. Rep. 303; *Railroad Co. v. Pollard*, 22 Wall. (U. S.) 341.

that his injuries were caused by the specific defect or mismanagement.

In the case of goods transported the plaintiff establishes a *prima facie* case by proving the loss of, or damage to, the goods. The burden is then on the carrier to show that such loss or damage resulted from some cause for which he is not liable.¹⁸ In the case of an *excepted risk* some courts apply the foregoing rule and some do not. Those which do apply it take the view that a common carrier may not by special contract relieve himself from losses caused by his own negligence.¹⁹ This, probably, is the better view. Many courts, however, hold that when the defendant shows that the loss or damage is within the excepted risk the burden is on the plaintiff to show that it was caused by the defendant's negligence.

In an action for damages against a railroad company for injuries caused by fires alleged to have been communicated from its engines the burden is on the plaintiff to show that the fires resulted from sparks or burning coals from defendant's engine. The burden is then on the de-

18. Chicago & N. W. Ry. Co. v. Dickinson, 74 Ill. 249; Hinkle v. Railway Co., 126 N. C. 932, 36 S. E. R. 348, 78 Am. St. Rep. 685; Gray v. Mobile Trade Co., 55 Ala. 387; United States Ex. Co. v. Backman, 28 Ohio St. 144; Levering v. Union Co., 42 Mo. 88, 97 Am. Dec. 320 and note.
19. Browning v. Goodrich Trans. Co., 78 Wis. 391; Gleeson v. Virginia Midland Ry. Co., 140 U. S. 435.

fendant to show that its engine was properly constructed and operated.²⁰

When damage is caused by a telegraph company in failing to deliver a message in the form in which it is received, proof of this fact establishes a *prima facie* case of liability. The burden is then on the company to rebut the presumption of negligence.²¹

§ 12. **Negligence of bailees.**—A bailee is not an insurer against loss or damage. His full duty is to exercise ordinary care. In case of loss or damage the burden is on the bailor to show it; and, as a general rule, it is upon him to show that it was owing to the bailee's fault.²² The courts hold, however, that where the goods wholly disappear and no explanation is given by the bailee, the burden is on him to show that he exercised due care.²³ And they hold likewise where the

20. *Coates v. Mo., K. & T. Ry. Co.*, 61 Mo. 38; *Union Pac. Ry. Co. v. Keller*, 36 Neb. 189, 54 N. W. R. 420; *Cleveland v. Grand Trunk Ry Co.*, 42 Vt. 449; *Spaulding v. Chicago & N. W. Ry Co.*, 30 Wis. 110, 11 Am. Rep. 550; *Field v. New York Cent. Ry. Co.*, 32 N. Y. 339; *Woodson v. C., M. St. P. Ry. Co.* 21 Minn. 60.

21. *Rittenhouse v. Ind. Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *Bartlett v. West. Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500.

22. *Lamb v. Camden Ry. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Knights v. Piella*, 111 Mich. 9, 69 N. W. R. 92, 66 Am. St. Rep. 375.

23. *First Nat. Bank v. Bank*, 116 Ala. 620, 22 So. R. 976; *Boies v. Hartford Ry. Co.*, 37 Conn. 279, 9 Am. Rep. 347.

bailee returns the goods in a damaged condition.²⁴

§ 13. **Negligence of innkeepers.**—At common law the liability of an innkeeper for loss of, or damage to, his guest's baggage is much greater than that of an ordinary bailee. He is bound well and safely to keep it; and in case it is lost or damaged he is not absolved from liability by showing that the loss or damage was not caused by his negligence or that of his servants. The burden is on him to show that it was caused by the fault of the guest, his companions or servants, or by some superior force.²⁵

This extreme liability, however, is not applicable to permanent boarders and others who have special contracts in regard to board.²⁶

Modern statutes have mollified, in a measure, the innkeeper's extreme liability; but it is still much greater than that of an ordinary bailee.

§ 14. **Payment of promissory note.**—When an action is brought on a promissory note and the defendant pleads payment, the burden of proof, in its primary sense, is on the defendant. This is owing to the fact that his plea is purely an affirm-

24. *Hildebrand v. Carroll*, 106 Wis. 324, 80 Am. St. Rep. 29; *Collins v. Bennett*, 46 N. Y. 490.

25. *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369, 371. See also *Bashr v. Downey*, 133 Mich. 163, 94 N. W. R. 750, 103 Am. St. Rep. 444; *Norcross v. Norcross*, 53 Me. 163.

26. *Chamberlain v. Masterson*, 26 Ala. 376; *Meacham v. Galloway*, 102 Tenn. 415, 73 Am. St. Rep. 886. For full discussion see note, 105 Am. St. Rep. 932-940.

ative one. It is in the nature of a plea of confession and avoidance.²⁷

§ 15. **Want of consideration pleaded.**—When the defendant pleads want of consideration, in an action on a promissory note, the burden of proof, in its primary sense, is on the plaintiff. This is owing to the fact that the defendant's plea is purely a negative one. He denies an essential element of the plaintiff's contention. The same principle is applicable as in the case where insanity is pleaded as a defense to a criminal charge.

§ 16. **Statute of limitations pleaded.**—Upon the question of burden of proof when the statute of limitations is pleaded as a defense, the courts are not harmonious. According to the better view the plea is an affirmative one and the burden of proof is on the defendant.²⁹ Many of the earlier decisions and some of the modern ones, however, including those of Massachusetts,³⁰ hold the contrary view.

§ 17. **Fraud alleged.**—As a general rule, where fraud is alleged the burden of proof is on the party who alleges it.³¹ An exception to this rule is where a *cestui que trust* alleges fraud in an ac-

27. *Crowninshield v. Crowninshield*, *supra*.

28. *Crowninshield v. Crowninshield*, *supra*.

29. See note, 81 Am. Dec. 725.

30. *Slocum v. Riley*, 145 Mass. 370.

31. *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697; *Beaty v. Fishel*, 100 Mass. 448; *Wallace v. Mattice*, 118 Ind. 59; *Marsh v. Cramer*, 16 Colo. 331.

tion against his trustee. This is owing to the fiduciary relation which exists between them.

§ 18. **Rule in quo warranto proceedings.**—In quo warranto proceedings against an office holder the burden is on the defendant to prove his title to the office he holds.³²

§ 19. **Exemption from operation of statute.**—When a party claims exemption from the operation of a statute on the ground of infancy, coverture, etc., the burden is on that party to prove the claim.

§ 20. **Modifications by statute.**—Statutes prescribe, in a measure, rules of evidence; and in some respects they modify the rules of evidence at common law in regard to burden of proof.

§ 21. **The right to open and close.**—The right to begin the introduction of evidence, and the right to open and close the argument, are closely allied with the burden of proof. As a general rule they belong to the plaintiff. This is because the burden of proof usually rests on him. In some cases, however, these rights belong to the defendant.

In an action for damages, whether *ex contractu* or *ex delicto*, if the damages are unliquidated these rights belong to the plaintiff.³³ On the

32. People *ex rel.* Saunier v. Stratton, 33 Col. 464, 81 Pac. R. 245; Swenson v. Norton, 46 Wis. 332; People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

33. Mercer v. Whall, 5 Q. B. D. 447, 5 Adol. & Ell. N. S. 447; Dorr v. Tremont Nat. Bank, 128 Mass. 349; Graham v. Gautier, 21 Tex. 111; Cunningham v. Gallagher, 61 Wis. 170; Lake Ont. Nat. Bank v. Judson, 122 N. Y. 278, 25 N. E. R. 367.

other hand, if they are liquidated, and the defendant admits the allegations averred by the plaintiff, and pleads a substantive defense, the burden of proof is on the defendant. The admissions by the defendant, however, must be full and complete.³⁴

34. *Fiss v. Warren*, 26 N. Y. 75; *Young v. Newark Fire Ins. Co.*, 59 Conn. 41; *Murray v. New York Life Ins. Co.*, 85 N. Y. 236.

CHAPTER IV.

Admissions.

§ 1. **Definition.**—An admission is a voluntary acknowledgement, made orally or in writing, or inferred from conduct, of a fact in issue or relevant to the issue, by or on behalf of a party to the proceeding.

§ 2. **Classification.**—Admissions are either express or implied. The former are created by words and the latter inferred from conduct.

§ 3. **When admissions are binding.**—Admissions to be binding must be made either by a party to the record who is the real party in interest or acting in a representative capacity as trustee for the real party in interest,¹ or by a person who has a substantial interest in the suit but

1. *Snow v. Paine*, 114 Mass. 520; *Greer v. Higgins*, 8 Kan. 519; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202, 100 Am. Dec. 628.

who is not a party to the record,² or by a person who is identified in interest either in blood, estate, contract or law with a party to the record.³

§ 4. **Must be self-disserving.**—A statement or act to be admissible as an admission must be self-disserving. In other words it must be such that an inference may be fairly drawn from it to the prejudice of the party who makes the statement or does the act.⁴

§ 5. **Admissions by an assignor.**—Admissions by an assignor, relative to the subject-matter of the assignment, made while owner thereof, are admissible against his assignee.⁵ But admissions by him, made after the assignment, are not binding.

§ 6. **Admissions by prior owner of real estate.**—Admissions by a prior owner of real estate, made while vested with the title, are binding on

2. *Fourth Nat. Bank v. Albaugh*, 188 U. S. 734; *Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214; *Tyler v. Ulmer*, 12, Mass. 163.

3. *Bigelow v. Foss*, 59 Me. 162; *Robinson v. Hutchinson*, 31 Vt. 443; *Taylor v. Hess*, 57 Minn. 96; *Mueller v. Relhan*, 94 Ill. 142.

4. *Stockwell v. Blaney*, 129 Mass. 312; *Doughty v. McMillan*, 92 Ga. 817; *Beasley v. Clark*, 102 Ala. 254.

5. *Jackson v. Bard*, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400. See full discussion in note, 42 Am. Dec. 631.

,his grantee. But those made, by him after parting with the title are not.⁶

§ 7. Admissions by prior owner of chattels.—Admissions by a prior owner of a chattel, made while vested with the title, are binding on his assignee.⁷

§ 8. Admissions by prior owner of choses in action.—Admissions by a prior owner of a chose in action, made while vested with the title, are, as a general rule binding on his assignee. But admissions by the holder of a negotiable instrument are not binding on a bona fide purchaser.⁸

§ 9. Admissions by an agent.—Admissions by a general agent, made within the real or apparent scope of his authority, are binding on his principal. In the case of a special agent, however, only admissions made by him within the *real scope* of his authority are binding on his principal.⁹

§ 10. Admissions by a partner.—Each partner is an agent of the firm; and his admissions, made within the real or apparent scope of the partner-

6. Chadwick v. Fonner, 69 N. Y. 404; Norton v. Pettibone, 7 Conn. 319, 18 Am. Dec. 116; Emmet v. Perry, 100 Me. 139, 60 Atl. R. 872.

7. People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49 and note.

8. Hauchett v. Kimbark, 118 Ill. 121; Hadden v. Mills, 4 Car. & P. 486.

9. Gott v. Dinsmore, 111 Mass. 45; Kilpatrick v. Kahn, 53 Kan. 274. See valuable notes, 53 Am. Dec. 773-778 and 95 Am. Dec. 72-75.

ship business, are binding on the firm.¹⁰ But the admissions of a partner, made after the decease of his copartner, as to partnership transactions, are not binding on the representative of his deceased copartner.¹¹

§ 11. **Admissions by a joint owner.**—Admissions by one joint owner are binding on the others.¹²

§ 12. **Admissions by a tenant in common.**—Admissions by a tenant in common are not binding on his cotenants.¹³

§ 13. **Admissions by a landlord.**—Admissions by a landlord, made within the scope of the relation, are binding on his tenant.¹⁴

§ 14. **Admissions by an ancestor.**—Admissions by an ancestor are binding on his heirs.¹⁵

§ 15. **Admissions by a testator and an intestate.**—Admissions by a testator are binding on his executor, or his administrator with the will

10. *Humes v. O'Brien*, 74 Ala. 64; *Henslee v. Camefes*, 49 Mo. 295; *Hurd v. Hagerty*, 24 Ill. 171; *Roberts v. Smith*, 143 Mass. 473.

11. *Flowers v. Hellen*, 29 Mo. 324; *Currie v. White*, 51 Cal. 530; *Winslow v. Newlan*, 45 Ill. 145; *Ostrom v. Jacobs*, 9 Metc. (Mass.) 454.

12. *Rex v. Hardwicke*, 11 East 589; *Irby v. Brigham*, 9 Humph. (Tenn.) 750.

13. *Dan v. Brown*, 4 Cow. (N. Y.) 483.

14. *Jackson v. Davis*, 5 Cow. (N. Y.) 123; *Jackson v. Myers*, 11 Wend. (N. Y.) 533.

15. *Davis v. Melson*, 66 Ia. 189.

annexed. And the admissions of an intestate are binding on his administrator.¹⁶

§ 16. **Admissions by a trustee and a cestui que Trust.**—The mere relation of trustee and *cestui que trust* does not make admissions by the former binding on the latter. But when the trustee is a nominal party to the record, or has express or implied authority in other cases to make admissions, the rule is otherwise.

The admissions of a *cestui que trust* are binding on his trustee.

§ 17. **Admissions by a tenant for life.**—Admissions by a tenant for life are not binding on the remainder man because of lack of privity.

§ 18. **Same. Owner in fee.**—Admissions by a tenant for life are not binding on the owner in fee.

§ 19. **Admissions by the principal debtor.**—Admissions by the principal debtor, made while the relation of principal and surety exists, are binding on the surety.¹⁷

§ 20. **Admissions by a joint tortfeasor.**—Admissions by a joint tortfeasor, which are not part of the *res gestae*, are not binding on the other tortfeasors.¹⁸

16. *Slade v. Leonard*, 75 Ind. 171; *Mueler v. Rebhan*, 94 Ill. 142; *Childs v. Jordan*, 106 Mass. 321.

17. *Bank of Brighton v. Smith*, 12 Allen (Mass.) 243, 90 Am. Dec. 144; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129.

18. See note, 1 L. R. A. 273; *Morse v. Royal*, 12 Ves. 362.

§ 21. **Admissions by a husband or wife.**—The admissions by one spouse are not, merely owing to the marital relation, binding on the other spouse.¹⁹

§ 22. **Admissions by an attorney.**—Admissions by an attorney, made within the agency relation, are binding on his clients.²⁰ According to the English rule an attorney has implied authority to compromise his clients' claims; but according to the weight of American authority he has not.²¹

§ 23. **Statements made in a party's presence.**—Statements made in a party's presence and heard by him are usually binding on him, provided he does not contradict or modify them.²² They are not binding on him, however, if the

19. *Edwards v. Tyler*, 141 Ill. 454; *Evans v. Evans*, 155 Pa. St. 572; *Donaldson v. Everhart*, 50 Kan. 718.
20. *Wilson v. Spring*, 64 Ill. 14; *Stokely v. Robinson*, 34 Pa. St. 315; *McLeron v. McNamara*, 55 Cal. 508; *Lewis v. Sumner*, 13 Metc. (Mass.) 269; *Starke v. Kenen*, 11 Ala. 818; *Davis v. Hall*, 90 Mo. 659.
21. *Wetherbee v. Fitch*, 117 Ill. 67; *Jones v. Inness*, 32 Kan. 177; *Kelly v. Wright*, 65 Wis. 236; *Fritchey v. Bosley*, 56 Md. 94; *North Whitehall v. Keller*, 100 Pa. St. 105, 45 Am. Rep. 361.
22. *Boston & W. Ry. Co. v. Dana*, 1 Gray (Mass.) 83; *Batturs v. Sellers*, 5 Harr. & J. (Md.) 117, 9 Am. Dec. 492; *Proctor v. Old Colony Ry. Co.*, 154 Mass. 251; *Com. v. Kenney*, 12 Metc. (Mass.) 235, 46 Am. Dec. 672, 675 and note; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753.

circumstances are such as not to justify contradiction or modification.²³

§ 24. Statements made in party's presence in judicial proceedings.—Statements made in the course of judicial proceedings by a witness, counsel, or police officer in the performance of his duty, are not impliedly binding on the party to which they refer because of his silence.²⁴

§ 25. Statements made in the pulpit.—Similarly, statements made by a preacher in delivering a sermon are not binding on a person in the audience to whom reference is made because of his silence.²⁵

§ 26. Statements in letters received and not answered.—Statements in letters, or other writings, received by a party, or found in his possession, and of such a nature as to elicit a reply, but which are unanswered, may be binding on him on the ground that his silence creates an inference of assent.²⁶

§ 27. Admissions in pleadings.—Statements contained in pleadings filed in the same cause in a proceeding at common law constitute a conclu-

23. *Slatterly v. People*, 76 Ill. 217; *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *Whitney v. Houghton*, 127 Mass. 527; *Johnson v. Trinity Church*, 11 Allen, 123; *Barry v. Davis*, 33 Mich. 515; *Brainard v. Buck*, 25 Vt. 573, 60 Am. Dec. 291.

24. *State v. Reed*, 62 Me. 129; *Kelley v. People*, 55 N. Y. 565; *Ettinger v. Com.*, 98 Pa. St. 338.

25. *Johnson v. Trinity Church*, *supra*.

26. *Giles v. Vandiver*, 91 Ga. 192; *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64; *Churchill v. Fulliam*, 8 Ia. 45.

sive waiver of proof thereof and may be referred to by counsel as admissions.²⁶ This rule is also applicable to equity proceedings. Moreover, some equity courts apply it to pleadings in causes other than the pending one.

§ 28. Effect of demurrers and pleas.—For the purpose of determining the legal sufficiency of a given pleading, a demurrer to it constitutes an admission of all facts well pleaded.²⁷

A demurer to evidence constitutes an admission of the truth of all facts which might reasonably be inferred from the evidence in the case.

A plea constitutes an admission of the truth of all facts well pleaded, and not denied by the plea.

§ 29. Rule against hearsay not applicable to admissions.—The rule against hearsay testimony has no application to admissions. They may be based on hearsay as well as on personal knowledge. The ground of their admissibility is their prejudicial nature as to the party who makes the statements.

§ 30. Parol evidence rule not applicable to admissions.—Nor is the parole evidence rule applicable to admissions. **Oral** admissions are ad-

27. *Star Ball Retainer Co. v. Klahn*, 145 Fed. R. 834; *Chapin v. Curtis*, 23 Conn. 388; *Pease v. Phelps*, 10 Conn. 62. A foreign law alleged in the declaration or bill is admitted by general demurrer. See *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 77 N. E. R. 877.

missible to contradict written statements, and even matters of record.²⁸

§ 31. Taking precautions to prevent future injury.—Remedying defects in a machine after an injury has been caused by it does not constitute an implied admission of prior negligence.

§ 32. Attempting to evade arrest.—A person's demeanor in attempting to evade arrest constitutes, in a measure, an implied admission of guilt and is admissible against him.

§ 33. Suppressing and fabricating evidence.—To suppress or fabricate evidence, or to bribe, or attempt to bribe, a witness, constitutes and implied admission that the person's cause is an unjust one.

§ 34. Failure to act.—The failure of a person to prosecute or defend an action, to assert a claim, to make complaint, etc., may constitute an implied admission receivable against him.

§ 35. Admissions rebuttable.—An admission either express or implied, is rebuttal. In this respect it differs from an estoppel.

§ 36. When admissions are not binding.—When an admission is made solely to effect a compromise and thereby avoid a suit, or when it is made under duress, it is not binding.²⁹

28. *Smith v. Palmer*, 6 Cush. (Mass.) 513.

29. *Citicago Ry. Co. v. Bishop of Chicago*, 119 Ill. 525; *Draper v. Hatfield*, 124 Mass. 53; *West v. Smith*, 101 U. S. 263, 273; *Louisville Co. v. Wright*, 115 Ind. 378; *Mundhenk v. Cent. Ia. Ry. Co.*, 57 Ia. 718; *Richardson v. International Pottery Co.*, 63 N. J. L. 248, 43 Atl. R. 692.

CHAPTER V.

Law and Fact—Court and Jury.

§ 1. **Classification of Issues.**—Issues which arise in actions at law are classified as follows: (1) issues of law; (2) issues of fact; and (3) issues of law and fact.

§ 2. **Functions of court and jury.**—As a general rule issues of law must be decided by the court, issues of fact by the jury, and issues of law and fact by the jury under proper instructions by the court.

§ 3. **Exceptions to the general rule.**—In a few states, including Illinois, Indiana, Maryland, Connecticut and Louisiana, owing to constitutional or statutory provisions, issues of law as well as of fact, are, in *criminal* cases, decided by the jury.

Preliminary issues of fact, such as competency of witnesses, relevancy of testimony, etc., are issues for the court to decide.¹

§ 4. **Confessions and dying declarations.**—When a confession or dying declaration is objected to on the ground that it lacks one or more of the essential elements of admissibility the court may, in its discretion, hear testimony and

1. *Com. v. Robinson*, 146 Mass. 571, 581, 16 N. E. R. 452; *State v. Cole*, 94 N. C. 958, 964; *Nelson v. Sun. Mut. Ins. Co.*, 71 N. Y. 453; *Dole v. Johnson*, 50 N. H. 462, 459; *Com. v. Lynes*, 142 Mass. 577, 580, 8 N. E. R. 408, 56 Am. Rep. 709.

arguments on both sides; and before doing so it may require the jury to withdraw.²

In case the confession or dying declaration is admitted by the court the jury may give it no weight if they see fit to do so, but they may not reject it as a matter of law.

§ 5. Construction and legal effect of a document.—The construction and legal effect of a document are issues for the court to decide.³

§ 6. Execution, existence, contents and meaning of a document.—These are issues for the jury to decide.

§ 7. Legal effect of an oral agreement.—When the facts are undisputed the legal effect of an oral agreement is an issue for the court to decide. But when the facts are disputed it is an issue for the jury to decide under proper instructions by the court.⁴

§ 8. Negligence the issue.—The question of

2. *Murphy v. People*, 63 N. Y. 590, 597; *Ellis v. State*, 65 Miss. 44, 3 So. R. 188, 7 Am. Rep. 634; *Com. v. Culver*, 126 Mass. 466.
3. *Bartlett v. Smith*, 11 Mees. & W. 483. In this case Lord Abinger says: "All questions respecting the admissibility of evidence are to be determined by the judge, who ought to receive that evidence and decide upon it without any reference to the jury." The trial court left it to the jury to say whether a certain bill of exchange was an inland bill or a foreign bill. See also, *Gorton v. Hadsell*, 9 Cush. (Mass.) 511.
4. *Festerman v. Parker*, 10 Ired. (N. C.) 474; *Pendelton v. Jones*, 82 N. C. 249; *Neilson v. Harford*, 8 Mees. & W. 806; *Spragins v. White*, 108 N. C. 449.

negligence is, as a general rule, a mixed issue of law and fact. Under proper instructions by the court it is for the jury to decide. But when the facts are undisputed and fair-minded men could draw but one inference from them the issue is for the court to decide.⁵

§ 9. Reasonableness the issue.—As a general rule, the issue of reasonableness, like the issue of negligence, is a mixed issue of law and fact; and under proper instructions by the court it is an issue for the jury to decide. But when the evidence is either insufficient or conclusive the court may decide it as a matter of law.⁶

§ 10. Whether certain goods are necessities.—When the question is whether certain goods under the circumstances of the particular case constitute necessities or not the issue is a mixed one of law and fact. The subject-matter in such case possesses certain attributes other than those possessed by it naturally and is within the definition of a rule of law. For this reason it is

5. *Bridges v. Lon. Ry. Co.*, 7 H. L. 213; *Jones v. East Ten. & Ry. Co.*, 128 U. S. 443; *Terre Haute, Etc. Ry. Co. v. Voelker*, 129 Ill. 540; *B. & O. Ry. Co. v. Owlings*, 65 Md. 502; *Lavarencz v. C. R. I. & P. Ry. Co.*, 56 Ia, 689; *Plummer v. East. Ry. Co.*, 73 Me. 591; *Penn. Co. v. Frana*, 112 Ill. 398; *Del. Etc. Ry. Co. v. Converse*, 139 U. S. 469; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *North Penn. Ry. Co. v. Com. Bank*, 123 U. S. 727, 733; *Stackus v. N. Y. Etc. Ry. Co.*, 79 N. Y. 464; *Rodrian v. N. Y. Etc. Ry. Co.*, 125 N. Y. 528.
6. *Panton v. Williams*, 2 Q. B. D. 169; *Stewart v. Sonneborn*, 98 U. S. 187.

the duty of the court to instruct the jury as to the legal definition of the term. It is then for the jury to decide the issue in the light of the court's instructions.⁷

§ 11. Whether certain real estate constitutes a homestead.—The principles involved in this case are similar to those involved in § 10. The issue is a mixed one of law and fact and is for the jury to decide under proper instructions by the court.

§ 12. Criminal intent the issue.—The question of criminal intent as an ingredient of crime is a mixed issue of law and fact. In so far as it is effected by rules of presumption and substantive law it is for the court to decide. In so far as it is a matter of fact the issue is for the jury to decide.

§ 13. Miscellaneous examples of mixed issues.—The following cases are examples of mixed issues of law and fact: Whether a certain act performed on Sunday was a work of charity or necessity. Whether a certain homicide was committed in self-defense. Whether a certain instrument is a deadly weapon. Whether a certain article constitutes baggage. Whether a husband has abandoned his wife.

In all such cases it is the duty of the court to instruct the jury as to the legal meaning of the

7. *Ryder v. Wombwell*, L. R. 4 Cxch. 32; *Peters v. Fleming*, 6 Mees. & W. 46; *Brooker v. Scott*, 11 Mees. & W. 67; *Johnstone v. Marks*, 19 Q. B. D. 509.

term and then for the jury to decide the issue in the light of the court's instructions.

§ 14. Function of court to withdraw the case from the jury.—Cases arise where the court may, in its discretion, withdraw them from the jury; and others arise where the court is bound to do so. As stated in "Hughes On Evidence," however, "This function is one which should be exercised only in very clear cases. It should never be exercised when the evidence, if material, is conflicting; nor when impartial minds might honestly and reasonably draw different conclusions therefrom. If the facts are undisputed or admitted, whether such facts constitute a legal cause of action, or a legal defense, is a question for the court to decide. To justify a withdrawal of the case from the jury, on the request of one of the parties, the evidence of the opposite party must be assumed to be true and all legitimate inferences therefrom must be in his favor. A mere scintilla of evidence in support of any theory of the case is not of itself sufficient to prevent a withdrawal. If at the close of the plaintiff's case there is no evidence at all to prove a material fact essential to recovery, the court, on the request of the defendant, is bound to instruct the jury to find a verdict for the defendant. If, however, such request is not made until after the defendant has introduced evidence which tends to prove such material fact, the court may refuse to so instruct the jury. Where there is any material evidence tending to prove all the

material requisites to a recovery the trial judge is bound to submit the case to the jury without regard to what, at the time, he may think he would do on a motion for a new trial.”⁸

§ 15. **How question of withdrawal is raised.**—The question of withdrawal of the case from the jury may be raised by a motion for a nonsuit, by a demurrer to the evidence or by a request that the court instruct the jury in favor of a certain party.

8. pp. 27, 28.

CHAPTER VI.

Demurrers to Evidence.

§ 1. **Definition.**—A demurrer to evidence is a declaration by the demurrant that he refuses to proceed on the ground that the evidence of the demurree is insufficient to establish the issue.

§ 2. **Joinder.**—A joinder in demurrer by the demurree is essential to a judgment on the demurrer. When the evidence is definite and clear the court will compel the demuree to join in demurrer.

§ 3. **Effect of a demurrer to evidence.**—A demurrer to the evidence and a joinder by the demurree takes the case from the jury for the court to decide upon the legal sufficiency of the evidence.

The demurrer admits all the facts which the

evidence tends to prove and also all reasonable inferences therefrom.¹

When the evidence is conflicting only that which is adverse to the demurrant is considered.

When the burden of proof is on the demurrant he is not entitled to judgment on the demurrer even when the evidence demurred to is insufficient. But when the burden is not on him and the evidence is sufficient to prove the issue judgment should be entered in his favor.

At common law a judgment on the demurrer terminated the case. According to the modern practice, however, when the demurrer is overruled the case proceeds.²

§ 4. Other analogous proceedings.—In modern practice demurrers to evidence are rarely used. In some states they are prohibited by statute. More efficient analogous proceedings are available. These include a motion to nonsuit; a motion that the court instruct the jury that, admitting that the plaintiff's evidence is true it is insufficient to entitle him to recover; submitting the case to the jury on an agreed statement of facts; a motion to set aside the verdict because contrary to the evidence.³

1. *Kansas City, etc., Ry. Co. v. Foster*, 39 Kan. 329; *Weber v. The Kansas City, etc., Co.*, 100 Mo. 194.

2. *Trout v. Virginia, etc., Ry. Co.* 23 Gratt. (Va.) 619.

3. *Golden v. Knowles*, 120 Mass. 336. See also, *Colgrove v. The New York, etc., Ry. Co.* 20 N. Y. 492. See also, *Parke v. Ross*, 11 How. (U.S.) 362; *Pleasants v. Saut*, 22 Wall. (U. S.) 116.

PART II.

Leading Principles and Rules of Exclusion.

CHAPTER I.

Relevancy of Testimony.

§ 1 **Relevancy. Definition. Application.**—Mr. Stephen says the term relevant “means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other.”¹ And Mr. Wharton defines relevance as “that which conduces to the proof of a pertinent hypothesis.”²

Testimony to be admissible must be relevant. This rule is universal.³

Many logically relevant facts, however, are not *legally* relevant. To be admissible in evidence they must be legally relevant.⁴

1. Stephens Dig. Ev., art. 1, p. 4.

2. Wharton, Evid., sec. 20.

3. Best, Evid. (10th ed.) sec. 251.

4. State v. Lapage, 57 N. H. 245, 28 Am. Rep. 75. In this case Cushing, C. J., says: “Although undoubtedly the relevancy of testimony is originally a matter of logic and common-sense, still there are many instances in which the evidence of particular facts as bearing upon particular issues has been so often the subject of discussion in courts of law, and so often

Testimony that is logically relevant may be excluded because too conjectural, or too remote, and for either of these reasons tends to unduly prejudice the jury; or because it tends to complicate the issue and thereby tends to confuse the jury.⁵

The rules of evidence are, in a large measure, rules of exclusion.

§ 2. **Facts legally relevant.**—Facts which are essentially involved in a decision of the case are legally relevant. These constitute the facts in issue.

Other facts which are logically relevant to the facts in issue and which, assuming them to be true, conclusively establish the existence or non-existence of a fact, or facts in issue, or of any fact or facts legally relevant thereto, are also legally relevant. Moreover, "The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in

ruled upon, that the united logic of a great many judges and lawyers may be said to furnish evidence of the sense common to a great many individuals, and thus to acquire the authority of law. It is for this reason that the subject of the relevancy of testimony has become to so great an extent, matter of precedent and authority, and we may with entire propriety speak of its legal relevancy."

5. *Durkee v. India Ins. Co.*, 159 Mass. 514; *Zenia Bank v. Stewart*, 114 U. S. 224; *Kellog v. Thompson*, 142 Mass. 76; *Hamilton v. Frothingham*, 59 Mich. 253; *Ockeshausen v. Durant*, 141 Mass. 338.

reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry or to assist, though remotely, to a determination probably founded on truth."⁶

§ 3. Similar transactions with other parties.—

The acts and declarations of third parties, and also those of one of the parties to the action and a third party, although they may be, in a measure, logically relevant, are, as a general rule, inadmissible. In general, this class of testimony, as said by Mr. Taylor, "it would be manifestly unjust to admit, since the conduct of one man under certain circumstances or toward certain individuals, varying as it will necessarily do according to the motives which influence him, the qualities he possesses and his knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behavior of another man similarly situated, or of the same man towards other persons."⁷ Thus, where the issue was whether certain rent was payable quarterly or half-yearly, testimony as to the way other tenants paid their rent, although in a measure logically relevant, was held inadmissible.⁸

§ 4. Similar acts injurious to others.—Testi-

6. *Holmes v. Goldsmith*, 147 U. S. 150, 164. See also, *Interstate Commerce Com. v. Baird*, 194 U. S. 150, 164; *Wood v. Finson*, 91 Me. 280, 39 Atl. R. 1007.
7. 1 Taylor, *Evid.*, sec. 317. See also, *Jackson v. Smith*, 7 Cow. (N. Y.) 718.
8. *Carter v. Pryke*, 1 Peake 95.

mony that similar acts caused injury to others, although logically relevant, is generally inadmissible both in civil and criminal cases. It "points a finger," but it is too conjectural. If admitted it might unduly prejudice the minds of the jury.⁹

§ 5. **Remedying defects after injury.**—Testimony that the defendant remedied the defects which caused the injuries complained of, soon after the latter occurred, is inadmissible to prove that he was negligent.¹⁰

§ 6. **Others injured by same cause.**—Testimony that others were similarly injured by the same cause under similar circumstances is legally, as well as logically, relevant. But testimony as to the particulars of the injuries to others is not legally relevant because it would complicate the issue and tend to confuse the jury.¹¹

9. *Holcomb v. Hewson*, 2 Camp. 391; *Elizabeth Emerson v. Lowell Gas Co.*, 3 Allen (Mass.) 410; *Petition of H. O. Thompson, Com., Etc.*, 127 N. Y. 463; *Amoskeag Manuf. Co. v. Head*, 59 N. H. 332.
10. *The Columbia, Etc., Ry. Co. v. Hawthorn*, 144 U. S. 202; *Morse v. Min. & St. L. Ry. Co.*, 30 Minn. 465; *Hodges v. Percival*, 132 Ill. 53; *Shinners v. Prop. of L. & C.*, 154 Mass. 168; *Lombar v. East Tawas*, 86 Mich. 14; *Mo. Pac. Ry. Co. v. Hennesey*, 75 Tex. 155; *Terre Haute & Ind. Ry. Co. v. Clem*, 123 Ind. 15; *Ely v. St. Louis, Etc. Ry. Co.*, 77 Mo. 34.
11. *District of Columbia v. Armes*, 107 U. S. 519; *Quinlan v. City of Utica*, 11 Hun. (N. Y.) 217, 74 N. Y. 603; *City of Chicago v. Powers*, 42 Ill. 169; *Augusta v.*

§ 7. **Proof of other crimes.**—When a person is charged with a certain crime testimony that he committed other crimes is generally inadmissible. There are, however, some exceptions to this rule. When the commission of other crimes constitutes a material link in the chain of circumstances which constitute evidence of a *motive* in doing the criminal act charged, or *guilty knowledge* as to this act, testimony that he committed the other acts is admissible to prove such motive or guilty knowledge. This testimony of the commission by the accused of other crimes, for the purposes stated, is admissible where the crime charged is—false pretenses,¹² receiving stolen goods,¹³ forgery,¹⁴ uttering forged or counterfeit paper,¹⁵ etc. To a limited extent the same principle has been applied in cases of embezzlement,¹⁶ arson,¹⁷ conspiracy,¹⁸ and adultery.¹⁹

Hafers, 61 Ga. 48; City of Delphi, Lowery, 74 Ind. 520; Hill v. Port. & Roch. Ry. Co., 55 Me. 438; Calkins v. City of Hartford, 33 Conn. 57; Kent v. Town of Lincoln, 32 Vt. 591.

12. People v. Shulman, 80 N. Y. 373; Queen v. Francis, L. R. 2 C. C. R. 128; Mayer v. People, 80 N. Y. 364; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596 and note.
13. Kilrow v. Com., 89 Pa. St. 480; State v. Ward, 49 Conn. 429; Copperman v. People, 56 N. Y. 591.
14. People v. McGlade, 139 Cal. 66, 72 Pac. R. 600; Com. v. Bigelow, 8 Metc. (Mass.) 235.
15. Com. v. Bigelow, *supra*; People v. Farrell, 30 Cal. 316.
16. Com. v. Tuckerman, 10 Gray (Mass.) 173; Rex v. Ellis, 6 Barn. & C. 145.

Testimony of the commission of other crimes by the accused is admissible when the other crimes constitute *integral parts of the same transaction*. Thus, this principle has been applied in cases of abortion,²⁰ larceny,²¹ robbery,²² burglary,²³ fraudulent voting,²⁴ gambling,²⁵ extortion,²⁶ and keeping a lottery.²⁷

§ 8. **Sales of similar land in vicinity.**—When the issue is the value of a certain tract of land some courts hold that testimony of the price at which other similar land in the vicinity was re-

17. *Com. v. Bradford*, 126 Mass. 42; *R. v. Long*, 6 Car. & P. 179.
18. *Packer v. United States*, 106 Fed. R. 906; *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596 and note.
19. *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346.
20. *People v. Seaman*, 107 Mich. 348, 65 N. W. R. 203, 61 Am. St. Rep. 326; *Com. v. Corken*, 136 Mass. 429.
21. *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. R. 678; *State v. Savage*, 36 Ore. 191, 60 Pac. R. 610; *Housh v. People*, 24 Colo. 262, 50 Pac. R. 1036.
22. *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *Hope v. People*, 83 N. Y. 419, 38 Am. Rep. 460.
23. *State v. Connell*, 12 Nev. 337; *Frazier v. State*, 135 Ind. 38, 34 N. E. R. 817.
24. *People v. Shea*, 147 N. Y. 78, 41 N. E. R. 508.
25. *Toll v. State*, 40 Fla. 169, 23 So. R. 993; *Com. v. Feerry*, 146 Mass. 209, 15 N. E. R. 484.
26. *State v. Lewis*, 96 Ia. 286, 65 N. W. R. 295; *Glover v. People*, 204 Ill. 170, 68 N. E. R. 464.
27. *Miller v. Com.*, 13 Bush (Ky.) 737; *Clark v. State*, 47 N. J. L. 556, 4 Atl. R. 327.

cently sold is admissible.²⁸ Other courts hold the contrary.²⁹ As such collateral matters complicate the case and tend to confuse the jury as well as unduly prejudice them, the latter view is the better one, but not the weight of authority. Moreover, more reliable testimony is available, viz., expert opinion.

§ 9. **Other acts or occurrences which refute the inference or contention of accident.**—When an inference arises, or a party to the *action* contends, that the act or occurrence in issue was *accidental* and not *intentional*, the adverse party may refute this inference or contention by showing that the act or occurrence in issue formed part of a series of similar acts or occurrences in which the former party was concerned. As said by Mr. Stephen, "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a *series of similar occurrences*, in each of which the person doing the act was concerned, is deemed to be relevant."³⁰ Cases involving the application of this principle are prosecutions for keeping a bawdy-house; for

28. *Packing Co. v. Chicago*, 111 Ill. 651; *Town of Cherokee v. Land Co.*, 52 Ia. 279, 3 N. W. R. 42; *Sawyer v. Boston*, 144 Mass. 470, 11 N. E. R. 711; *St. Louis, K. & N. W. Ry. Co. v. Clark*, 121 Mo. 169, 25 S. W. R. 192; *Armory v. Melrose*, 162 Mass. 556, 39 N. E. R. 276; *Washburn v. Ry. Co.*, 59 Wis. 364.

29. *In re Thompson*, 127 N. Y. 463, 28 N. E. R. 389; *Ry. Co. v. Zeimer*, 124 Pa. St. 414; *Robinson v. Ry. Co.*, 175 N. Y. 219, 67 N. E. R. 431.

30. Stephen Dig. Ev., art. 12 and cases cited.

burning a building to recover the insurance money;³² for malicious shooting, etc.³³

§ 10. **Methods and appliances used by others.**—In negligence cases testimony of methods and appliances used by others in similar cases is generally inadmissible. There are, however, exceptions to this rule. Thus, where the business carried on is of an exceptionally hazardous nature due care requires the use of the most approved methods and appliances, and testimony on this point is legally relevant.

§ 11. **Preparation, motive, threats, etc.**—Testimony which shows preparation, motive, opportunity, threats, etc., is legally relevant.³⁴ And testimony which shows impossibility of opportunity or of ability to do the alleged act is also legally relevant.³⁵ Thus, testimony is frequently introduced to prove an alibi.

§ 12. **Relevancy of Demeanor.**—When a party is accused of a tort or a crime and he manifests guilt by making false statements, attempting to escape, concealing property, etc., testimony of such acts is legally relevant.³⁶

§ 13. **Accompanying statements.**—Statements

31. *Harwood v. People*, 26 N. Y. 190, 84 Am. Dec. 175.

32. *R. v. Gray*, 4 Fost. & F. 1102.

33. *R. v. Voke*, Russ. & R. Cr. C. 531.

34. *Com. v. Goodwin*, 14 Gray (Mass.) 55; *Blake's v. Da-Cunha*, 126 N. Y. 293; *Bruner v. Wade*, 84 Ia. 698.

35. *Moulton v. Aldrich*, 28 Kan. 300.

36. *Murray v. Chase*, 134 Mass. 92; *Lindsay v. People*, 63 N. Y. 143.

by or to a party charged with doing an act, and which accompany and limit, characterize or explain it, are legally relevant.³⁷ Such statements constitute part of the *res gestae*. And statements made prior to the act may be legally relevant. Thus, statements made half an hour before the alleged act were held admissible on the ground that they constituted part of a continuous quarrel or altercation.³⁸

§ 14. **Financial standing of parties.**—Where the plaintiff may be awarded *exemplary* damages the financial standing of both the plaintiff and the defendant is, in some classes of cases, legally relevant. These include actions for seduction, criminal conversation,³⁹ malicious prosecution,⁴⁰ assault and battery,⁴¹ slander and libel,⁴² etc.

§ 15. **Similar accidents under similar conditions.**—As to the legal relevancy of testimony of

37. *Ins. Co. v. Mosley*, 8 Wall. (U. S.) 411; *Lund v. Tyngsborough*, 9 Cush. (Mass.) 42; *Hutcheis v. Ry. Co.*, 128 Ia. 279, 103 N. W. R. 779 (In this case the plaintiff, just after she fell, made the statement "Yes, let down the step after I fall!")

38. *Wood v. State*, 92 Ind. 269.

39. *Peters v. Lake*, 66 Ill. 206, 16 Am. Rep. 593.

40. *Winn v. Peckham*, 42 Wis. 493; *Whitefield v. Westbrook*, 40 Miss. 311.

41. *Jones v. Jones*, 71 Ill. 562; *Rowe v. Moses*, 9 Rich (S. C.) 423, 67 Am. Dec. 560 and note; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582.

42. *Kidder v. Bacon*, 74 Vt. 263, 52 Atl. R. 322; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303.

similar accidents under similar conditions the cases are in conflict. Some hold that such testimony is admissible.⁴³ Others hold the contrary.⁴⁴

§ 16. **Testimony that many others escaped injury.**—In actions for damages caused by alleged negligence in failing to keep buildings, grounds, walks, etc., in safe condition, testimony that many others passed thru or on them without being injured is legally relevant to show want of negligence, provided the circumstances are coincident and similar.⁴⁵ Otherwise such testimony is inadmissible.⁴⁶

§ 17. **Customs and usages of others.**—Testimony of the customs and usages of others, engaged in like enterprises, to show want of negligence, is admissible in some cases and not in others. Where the question of negligence involved in the case depends upon the degree of care which other persons engaged in similar bus-

43. *District of Columbia v. Armes*, 107 U. S. 519; *Brady v. Manhattan Ry. Co.*, 127 N. Y. 46; *Illinois Cent. Ry. Co. v. Treat*, 179 Ill. 576, 54 N. E. R. 290.

44. *Schloff v. Ry. Co.*, 100 Ala. 377, 14 So. R. 105; *Hudson v. Chicago & N. W. Ry. Co.*, 59 Ia. 581, 44 Am. Rep. 692.

45. *Crafter v. Metropolitan Ry. Co.* L. R. 1 C. P. 300; *House v. Metcalf*, 27 Conn. 631; *Calkins v. Hartford*, 33 Conn. 57.

46. *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260; *Collins v. Inhab. of Dor.*, 6 Cush. (Mass.) 396; *Hubbard v. A. K. Ry. Co.*, 39 Me. 506; *Kidder v. Inhab. of Dunstable*, 11 Gray (Mass.) 342.

iness in the vicinity were in the habit of bestowing on property similarly situated the testimony is admissible.⁴⁷ On the other hand, where the defendants conduct does not so depend such testimony is inadmissible. As said by Strong, J., "The issue to be determined was, whether the defendant had been guilty of negligence; that is, whether it had failed to exercise that caution and diligence which the circumstances demanded, and, which prudent men ordinarily exercise. Hence the standard by which its conduct was to be measured was not the conduct of other railroad companies in the vicinity; certainly not their usual conduct."⁴⁸ This class of testimony has been held inadmissible to show usages of other railroad companies, in the vicinity, as regards the blowing of whistles,⁴⁹ keeping their turntables locked,⁵⁰ etc.

§ 18. **Habits of animals.**—When the habits or traits of an animal are material, testimony of specific instances of the manifestation of them,

47. *Cass v. Bos. & Low. Ry. Co.*, 14 Allen (Mass.) 448. (Tub of sugar disappeared from defendant's warehouse).

48. *Grand Trunk Ry. Co. v. Richardson et al.*, 91 U. S. 454 (In this case testimony that other railroad companies did not employ watchmen to guard their bridges in the vicinity was held inadmissible).

49. *Hill v. Portland Ry. Co.*, 55 Me. 438, 92 Am. Dec. 601.

50. *Koons v. St. Louis Ry. Co.*, 65 Mo. 592; *G., C. & St. F. Ry. Co. v. Evansich*, 61 Tex. 3.

both before and after the particular instance involved, is admissible.⁵¹

§ 19. Habitual negligence. Imperfect engines. Fires.—When the plaintiff sues to recover damages for the loss of property which he alleges was destroyed by fire owing to the defendant's negligence in carelessly and unskillfully operating an imperfect locomotive engine, and there is no evidence of any suspicion, testimony that safer and better appliances are used by other companies is legally relevant.⁵² Owing to the hazardous nature of the business an essential of due care is the use of the most approved methods and appliances and a general lack of such shows habitual negligence.

§ 20. Company discharges servant.—Where the defendant is sued for damages caused by alleged negligence, testimony that the company discharged the servant who is alleged to have been responsible for the injury is not admissible.⁵³ To hold otherwise would tend to discourage the adoption of additional safeguards by improving the quality and raising the standard of such service. Moreover, such testimony has a

51. *Todd v. Rowley*, 8 Allen (Mass.) 51 (horse had habit of shying).

52. *Sheldon v. Hudson R. Ry. Co.*, 14 N. Y. 218, 67 Am. Dec. 155 and note; *Thatcher v. Maine Cent. Ry. Co.*, 85 Me. 502; *Henderson v. Phil. & R. Ry. Co.*, 144 Pa. St. 461.

53. *Hewitt v. Taunton Street Ry. Co.*, 167 Mass. 484.

strong tendency to unduly prejudice the jury against the defendant.

§ 21. **Owner's knowledge of animal's vicious propensities.**—Where injuries are caused by a vicious animal, testimony that the animal had attacked other persons upon former occasions and that knowledge of these attacks was brought home to the owner is legally relevant. But testimony of the particulars of the former attacks is inadmissible.⁵⁴

§ 22. **Good faith of defendant.**—Testimony that shows that the defendant acted in good faith may be legally relevant. Thus, in a malicious prosecution suit he may show that in making complaint against the present plaintiff he did so in good faith based upon representations made to him which he believed to be true.⁵⁵ And in a homicide case he may show that he acted in reasonable self defense.⁵⁶ Again, in an action to recover damages for fraudulently misrepresenting the solvency of a person testimony that the defendant acted in good faith is legally relevant.⁵⁷

54. Roscoe's *Nisi Prius* 739.

55. *Bacon v. Towne*, 4 Cush. (Mass.) 217.

56. *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49 and full note.

57. *Skeen v. Bumpstead*, 1 Hurl. & C. 358.

CHAPTER II.

Character.

§ 1. **Definition.**—The term “character” has been defined as “The combination of properties, qualities or peculiarities which distinguishes one person or thing, or one group of persons or things, from others; specifically, the sum of inherited and acquired ethical traits which give to a person his moral individuality.”¹

§ 2. **Character versus reputation.**—The terms character and reputation are frequently used interchangeably. The former, however, comprises the *actual* moral qualities or traits, whereas the latter consists of the current, popular impression that exists in regard to them.

§ 3. **General rule in civil cases.**—As a general rule testimony is not admissible in civil cases to prove the character of a party to the litigation.² There are, however, exceptions to this rule.

§ 4. **Reason for the rule.**—The chief reason for this rule is that, as regards the merits of the case,

1. Century Dict.

2. Soule v. Bruce, 67 Me. 584; Vawter v. Hultz, 112 Mo. 633, 639, 20 S. W. R. 689; Dain v. Wycoff, 18 N. Y. 45, 72 Am. Dec. 493; Lord v. Mobill, 113 Ala. 360, 21 So. R. 366; Vance v. Richardson, 110 Cal. 414, 42 Pacific R. 909; Am. Fire Ins. Co. v. Hazen, 110 Pa. St. 530, 1 Atl. R. 605; Lamagdeline v. Tremblay, 162 Mass. 339, 39 N. E. 38; So. Kan. Ry. Co. v. Robins, 43 Kan. 145, 23 Pac. R. 113; Dudley v. McCluer, 65 Mo. 241, 27 Am. Rep. 273; Wolf v. Troxell 94 Mich. 573, 54 N. W. R. 383; McDonald v. Savoy, 110 Mass. 49.

the inferences that may be drawn from this class of testimony are too vague and unreliable and for this reason might unduly prejudice the minds of the jury.³

§ 5. Limitation of the rule.—The rule of evidence which excludes character-testimony in civil cases is confined to instances in which character constitutes a basis for the inference of conduct. Where a particular trait of character, either of a party to the litigation or of a third party, is materially relevant to a fact in issue, or to a material evidentiary fact, apart from any inference as to conduct, character-testimony is admissible.⁴

§ 6. Illustrations of exceptions to the general rule.—The principle stated in the latter part of § 5 applies to actions for seduction,⁵ breach of

3. *Houghtaling v. Kelderhouse*, 2 Barb. (N. Y.) 149 (In this case Parker, J., says "But in a civil suit, where the personal rights of opposite parties are to be weighed in a nicely adjusted balance, no proof except that relating to the facts in controversy should be admitted to turn the scale.").
4. *Falkner v. Behr*, 75 Ga. 671; *Ficken v. Jones*, 28 Cal. 618; *Baumier v. Antian*, 79 Mich. 509, 44 N. W. R. 939; *Mullins v. Cottrell*, 41 Miss. 291.
5. *Dudley v. McCluer*, 65 Mo. 241, 27 Am. Rep. 273; *Burnett v. Simpkins*, 24 Ill. 264; *Goldsmith v. Picard*, 27 Ala. 142; *White v. Murtland*, 71 Ill. 250.

promise of marriage;⁶ indecent assault;⁷ rape;⁸ criminal conversation (under certain conditions);⁹ slander;¹⁰ libel;¹¹ malicious prosecution;¹² keeping an incompetent servant,¹³ etc.

§ 7. **Action for criminal conversation.**—In an action for damages for criminal conversation the chastity of the wife does not constitute part of the plaintiff's case.¹⁴ Nor does adulterous conduct on the part of the plaintiff husband constitute a bar to his right of action.¹⁵ But if the wife's chastity is attacked, either directly or on cross-examination, character-testimony is then

6. *McCarty v. Coffin*, 157 Mass. 478, 32 N. E. R. 649; *Von Storch v. Griffin*, 77 Pa. St. 504; *Hughes v. Nolte*, 7 Ind. App. 526, 34 N. E. R. 649. See also 5 Cyc. 1013, 1015.
7. *Bingham v. Bernard*, 36 Minn. 114, 30 N. W. R. 404.
8. *Young v. Johnson*, 123 N. Y. 226, 25 N. E. R. 363.
9. *Pratt v. Andrews*, 4 N. Y. 493; *Rea v. Tucker*, 51 Ill. 110.
10. *Hosely v. Brooks*, 20 Ill. 115; *Downey v. Dillon*, 52 Ind. 442; *Burnett v. Simpkins*, 24 Ill. 265; *Larned v. Buffinton*, 3 Mass. 546; *Adams v. Lawson*, 17 Grat. (Va.) 250. See also *Fahey v. Crotty*, 63 Mich. 383.
11. *Adams v. Smith*, 58 Ill. 417; *Proctor v. Houghtaling*, 37 Mich. 41; *Scott v. Sampson*, 8 Q. B. D. 491.
12. *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. R. 93; *McIntire v. Levering*, 148 Mass. 546; *Blizzard v. Hays*, 46 Ind. 166.
13. *Frazier v. Penn. Ry. Co.*, 38 Pa. St. 104, 80 Am. Dec. 467; *East Line, etc., Ry. Co. v. Scott*, 68 Tex. 694, 5 S. W. R. 501.
14. *Pratt v. Andrews*, 4 N. Y. 493.
15. *Rea v. Tucker*, 51 Ill. 110.

admissible to sustain it.¹⁶ Moreover, this class of testimony, as to both the husband and the wife, is admissible as to the question of mitigation of the damages.¹⁷

§ 8. **In mitigation of damages.**—The admissibility of character-testimony may depend upon the purpose for which it is offered. In some cases it is admissible in mitigation of damages where it would be inadmissible in bar of the action.¹⁸

§ 9. **Bastardy cases.**—In this class of cases the character of the complaining witness is not in issue; and the testimony of her general bad reputation for chastity is inadmissible. Moreover, testimony that she had intercourse with men other than the accused, or that since the birth of her child she has lived the life of a common prostitute, is also inadmissible.¹⁹

§ 10. **Actions for malicious prosecution.**—As to the admissibility of character-testimony in this class of cases the decisions are somewhat in conflict. Some courts hold that, as regards the

16. Pratt v. Andrews, *supra*.

17. Rea v. Tucker, *supra*.

18. O'Brien v. Frazier, 47 N. J. L. 349, 1 Atl. R. 465; 54 Am. Rep. 170; Rosenkrans v. Barker, *supra* (malicious prosecution).

19. Duffies v. The State, 7 Wis. 567; Rawles v. State, 56 Ind. 433; Olson v. Peterson, 33 Neb. 358; Com. v. Moore, 3 Pick. (Mass.) 194; The State v. Read, 45 Ia. 469; Com. v. Churchill, 11 Metc. (Mass.) 538 (overruling Com. v. Murphy, 14 Mass. 387); Bookhout v. The State, 66 Wis. 415, 28 N. W. R. 179.

questions of probable cause and malice, as well as the question of mitigation of damages, the defendant may introduce testimony of the general bad reputation of the plaintiff.²⁰ Other courts, on the other hand, hold that when this class of testimony is not offered in mitigation of damages, but as circumstantial evidence of actual character, with the view of making it the basis of an inference as to the plaintiff's conduct, it is not legally relevant.²¹ Upon principle, the latter view is correct. This view has been also applied to actions of libel and slander.²²

§ 11. Testimony of financial and social standing.—As a general rule, testimony of the financial or social standing of a party to the litigation is inadmissible.²⁴ There are, however, exceptions to this rule.

§ 12. Defendant's financial and social standing.—In cases involving exemplary or punitive damages testimony of the financial and social standing of the defendant is admissible. Thus,

20. *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Gregory v. Chambers*, 78 Mo. 294; *Barron v. Mason*, 31 Vt. 189.

21. *Harding v. Brooks*, 5 Pick. (Mass.) 244; *Mathews v. Huntly*, 9 N. H. 146; *Cornwall v. Richardson*, R. & M. 305, 27 Rev. Rep. 753, 21 E. C. L. 758.

22. *Holley v. Burgess*, 9 Ala. 728 (slander). See also *Libel and Slander in Cyc.*

23. *Johnson v. Smith*, 64 Me. 555.

24. *Brown v. Klock*, 117 N. Y. 340, 22 N. E. R. 944; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661. See also note 67 Am. Dec. 562-568.

in actions for malicious prosecution;²⁵ slander and libel;²⁶ seduction;²⁷ assault and battery;²⁸ negligence;²⁹ criminal conversation,³⁰ and trespass,³¹ the circumstances may justify awarding exemplary damages; and where they do testimony of the defendant's financial and social standing is admissible. Moreover, in some cases testimony of the defendant's financial and social standing is admissible where only compensatory damages are asked. Thus, where the injury is to the character, or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant.³² This principle has been applied in actions for slander and

25. *Winn v. Peckham*, 42 Wis. 493; *Whitfield v. Westbrook*, 40 Miss. 311.
26. *Larned v. Buffington*, 3 Mass. 546, 3 Am. Dec. 185; *Kidder v. Bacon*, 74 Vt. 263, 52 Atl. R. 322; *Buckley v. Knapp*, 48 Mo. 152, *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303.
27. *Lee v. Hammond*, 114 Wis. 550; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539 and note; *Clem v. Holmes*, 33 Gratt. (Va.) 722, 36 Am. Rep. 793.
28. *Jones v. Jones*, 71 Ill. 562; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Harris v. Marco*, 16 S. C. 575.
29. *McBride v. McLaughlin*, 5 Watts (Pa.) 375.
30. *Peters v. Lake*, 66 Ill. 206, 16 Am. Rep. 593. See also note 99 Am. Dec. 539.
31. *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6.
32. *Johnson v. Smith*, 64 Me. 555.

libel;³³ seduction;³⁴ breach of promise to marry,³⁵ etc.

§ 13. **Plaintiff's financial and social standing.**—In cases in which *exemplary* damages are allowable testimony of the financial and social standing of the plaintiff is admissible.³⁶ But in cases in which this feature is not involved this class of testimony is inadmissible.³⁷

§ 14. **Character of defendant in a criminal case.**—Where a person is on trial for a criminal offense it is not competent for the prosecution to attack the character of the defendant before he introduces evidence of his good character.³⁸

§ 15. **Same. Flight from state. In trouble**

33. Taylor v. Pullen, 152 Mo. 434, 53 S. W. R. 1086; Botsford v. Chase, 108 Mich. 432, 66 N. W. R. 325; Humphries v. Parker, 52 Me. 507. *contra*, Enos v. Enos, 135 N. Y. 609, 32 N. E. R. 123. See note, 67 Am. Dec. 565.
34. Wilson v. Shepler, 86 Ind. 275; Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768.
35. Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442 and note; Royal v. Smith, 40 Ia. 615; Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444. See also full note 63 Am. Dec. 545-547.
36. Clements v. Mahoney, 55 Mo. 352 (slander); Bump v. Betts, 23 Wend. (N. Y.) 85 (malicious prosecution); Eltringham v. Earkard, 67 Miss. 488, 7 So. R. 346, 19 Am. St. Rep. 319 (assault and battery); Sloan v. Edwards, 61 Md. 69 (assault and battery).
37. Barbour v. Horn, 48 Ala. 566; Penn. Ry. Co. v. Roy, 102 U. S. 451; Mo. Pac. Ry. Co. v. Lyde, 57 Tex. 505; Pitts. Ry. Co. v. Powers, 74 Ill. 343.
38. State v. Nelson, 98 Mo. 414, 11 S. W. R. 997; Mann v. State, 22 Fla. 600; State v. Thurtell, 29 Kan. 148,

before.—In a murder trial the prosecution may ask the defendant whether, after the killing complained of, he did not flee from the state. Moreover, where the defendant is asked if he had been in trouble before, and he voluntarily answers the questions, the testimony is competent.³⁹

§ 16. When testimony as to violent character of deceased inadmissible.—Where the accused is on trial for murder or manslaughter, and the evidence shows that the altercation which resulted in the homicide was provoked by the defendant, and that he could have retreated with safety, if at any time he was in imminent peril, testimony as to the violent and blood-thirsty character of the deceased is inadmissible.⁴⁰

§ 17. Testimony of good character of defendant.—Testimony of the good character of the defendant is always admissible; and it is not error for the trial court to refuse to instruct the jury that testimony of his good character is inadmissible unless his character has been assailed.⁴¹ And where a witness testifies that the defendant is a quiet man and good natured, as far as he knows, it is not error for the court to exclude, against objection, the question, "state what his disposition is when crossed or misused."⁴²

39. *Baker v. Com.*, 13 Ky. L. Rep. 571, 17 S. W. R. 625.

40. *Jones v. State*, 120 Ala. 303, 25 So. R. 204.

41. *State v. Donohoo*, 22 W. Va. 761.

42. *Thoams v. People*, 67 N. Y. 218.

§ 18. **General character for chastity where woman is on trial for murder.**—When a woman is on trial for the murder of a man her general character for chastity is no more necessarily involved in the question of her guilt or innocence than her general character in any other respect; and the prosecution may not introduce testimony upon this point unless the defendant herself initiate the inquiry. The fact that her defense is rendered more formidable, when considered in connection with the good character which the law presumes her to possess, does not of itself open the door for the prosecution to prove that her general character for chastity is bad.⁴³

§ 19. **The limitation of character-evidence.**—Where a defendant in a criminal case testifies in his own behalf, but introduces no testimony as to his general character, and the prosecution introduces evidence as to his bad character, the evidence introduced by the prosecution in such case may be considered only as affecting the credibility of the defendant as a witness, and not as a circumstance in determining the question of his guilt or innocence.⁴⁴

§ 20. **Chastity of prosecutrix in criminal action for seduction.**—In an action for seduction chastity of the prosecutrix is an essential ingredient of the offense. In the absence of evidence to the contrary it is presumed, and the burden of

43. *People v. Fair*, 43 Cal. 137.

44. *Adams v. People*, 9 Hun (N. Y.) 89.

overcoming this presumption is on the defendant. If, however, evidence is introduced which tends to prove the unchastity of the prosecutrix reasonable doubt of her chastity is as fatal to a conviction as is the existence of such doubt in reference to any other material fact.⁴⁵ A prosecution for adultery, however, is not like a case of seduction in which the previous chastity of the woman is necessarily in issue. In the former case the chastity of the woman is not an essential ingredient of the offense.⁴⁶

§ 21. **Mode of proving character.**—As a general rule proof of character is limited to proof of general reputation.⁴⁷ There are, however, exceptions to this rule. In some cases testimony is admissible to prove particular facts.⁴⁸ Moreover, where a party to the litigation seeks to impeach the credibility of a witness *personal opinion* of the impeaching witness is legally relevant.

§ 22. **Mode of eliciting the personal opinion of an impeaching witness.**—The personal opinion of an impeaching witness must be based upon the general reputation for truth and veracity of the witness whose credibility is sought to be im-

45. *State v. Traylor*, 121 N. C. 674, 28 S. E. R. 493; *Calhoun v. Com.*, 23 Ky. L. Rep. 1188, 64 S. W. R. 965.

46. *People v. Knapp*, 42 Mich. 267, 3 N. W. R. 927, 36 Am. Rep. 438; *Smith v. State*, 118 Ala. 117, 24 So. R. 55.

47. *R. v. Rowton*, Leigh & Cave 520; *Com. v. Hardy*, 2 Mass. 317.

48. *White v. Murtland*, 71 Ill. 250; *Berry v. Watkins*, 7 Car. & P. 308; *Love v. Masoner*, 6 Baxt. (Tenn.) 24, 32 Am. Rep. 522.

peached. In laying the foundation for eliciting the personal opinion of an impeaching witness he is first asked if he knows the general reputation for truth and veracity of the witness whose credibility is sought to be impeached, in the neighborhood in which the latter resides. If the answer is in the affirmative he is then asked to state what that general reputation is. If the answer is that it is bad the witness may then be asked if, based upon that reputation, he would believe him on oath.

§ 23. Scope of character testimony.—Character-testimony should be restricted to the trait of character involved in the issue. Some courts, however, apply a more liberal rule. Thus, in seeking to impeach the credibility of a witness the trait of character involved is untruthfulness ; and the testimony should be restricted to this trait. Some courts, however, apply a more liberal rule and admit testimony of the bad reputation of the person generally.

§ 24. Trait of being a peaceable and law-abiding citizen.—In some cases testimony of the defendant's general reputation for being a peaceable and law-abiding citizen is admissible. This principle has been applied in actions for felonious homicide;⁴⁹ rape;⁵⁰ assault;⁵¹ carrying concealed weapons;⁵² train-wrecking,⁵³ etc.

49. *Bayse v. State*, 45 Neb. 261, 63 N. W. R. 811; *Carr v. State*, 135 Ind. 1, 34 N. E. R. 533, 41 Am. St. Rep. 408, 20 L. R. A. 863; *Jones v. State*, 120 Ala. 303, 25 So. R. 204.

§ 25. **Trait of being a violent person.**—When the accused is on trial for felonious homicide and he pleads self-defense and introduces evidence to prove it, testimony of the general reputation of the deceased for being a violent person is admissible.⁵⁴ This principal is also applicable to actions for assaults in general.

§ 26. **Trait of chastity.**—In actions of seduction,⁵⁵ rape;⁵⁶ breach of promise to marry;⁵⁷

50. *Lincecum v. State*, 29 Tex. App. 328, 15 S. W. R. 818, 25 Am. St. Rep. 727; *State v. Sprague*, 64 N. J. L. 419, 45 Atl. R. 788.

51. *Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325; *People v. Gordon*, 103 Cal. 568, 37 Pac. R. 534; *State v. Schleagel*, 50 Kan. 325, 31 Pac. R. 1105.

52. *Lann v. State*, 25 Tex. App. 498, 8 S. W. R. 650, 8 Am. St. Rep. 445.

53. *State v. Douglass*, 44 Kan. 618, 26 Pac. R. 476.

54. *Fahey v. Crotty*, 63 Mich. 382; *Givens v. Bradley*, 3 Bibb (Ky.) 192, 6 Am. Dec. 646; *Davidson v. State*, 135 Ind. 254, 34 N. E. R. 972; *Williams v. State*, 74 Ala. 18; *Thomas v. People*, 67 N. Y. 218; *Powell v. State*, 101 Ga. 9, 29 S. E. R. 309, 65 Am. St. Rep. 277.

55. *People v. Knapp*, 42 Mich. 267, 3 N. W. R. 927, 36 Am. Rep. 438; *People v. Wade*, 118 Cal. 672, 50 Pac. R. 841; *White v. Murtland*, 71 Ill. 250; *Love v. Masoner*, 6 Baxt. (Tenn.) 24, 32 Am. Rep. 522.

56. *Young v. Johnson*, 123 N. Y. 226, 25 N. E. R. 363; *State v. Knapp*, 45 N. H. 148.

57. *McCarty v. Coffin*, 157 Mass. 478, 32 N. E. R. 649; *Von Storch v. Griffin*, 77 Pa. St. 504; *State v. Schleagel*, 50 Kan. 325, 31 Pac. R. 1105.

indecent assault;⁵⁸ adultery,⁵⁹ etc., the trait of chastity may constitute an ingredient of the act charged, in which case testimony of the general reputation of the party for chastity or unchastity is admissible. The same principle is applicable where the crime charged is carnal knowledge of a girl under sixteen "theretofore chaste."⁶⁰

§ 27. **Trait of honesty.**—In actions for larceny,⁶¹ receiving stolen goods,⁶² malicious mischief,⁶³ fraud,⁶⁴ etc., the trait of honesty is relevant to the issue and testimony of the person's general reputation for honesty is admissible.

§ 28. **Trait of kindness.**—This trait has been recognized as materially relevant to the issue in actions for infanticide⁶⁵ and seduction;⁶⁶ and testimony of general reputation has been held admissible to show it.

§ 29. **Trait of veracity.**—As heretofore stated, the credibility of a witness may be impeached by showing that his general reputation for truth

58. *Bingham v. Bernard*, 36 Minn. 114, 30 N. W. R. 404; *R. v. Rowton*, Leigh & Cave, 520.

59. *Cauley v. State*, 92 Ala. 71, 9 So. R. 456; *United States v. Bredemeyer*, 6 Utah, 143, 22 Pac. R. 110.

60. *People v. Mills*, 94 Mich. 630, 54 N. W. R. 488.

61. *State v. Bloom*, 68 Ind. 54, 34 Am. Rep. 247; *Long v. State*, 11 Fla. 295.

62. *Bernecker v. State*, 40 Neb. 810, 59 N. W. R. 372; *Com. v. Gazzolo*, 123 Mass. 220, 25 Am. Rep. 79.

63. *Browder v. State*, 30 Tex. App. 614, 18 S. W. R. 197.

64. *Hanney v. Com.* 116 Pa. St. 322, 9 Atl. R. 339.

65. *State v. Cunningham*, 111 Ia. 233, 82 N. W. R. 775.

66. *People v. Mills*, 94 Mich. 630, 54 N. W. R. 488.

and veracity is bad; and character-testimony is admissible to rebut it. It is also held that the trait of veracity is materially relevant in actions for perjury,⁶⁷ and malicious mischief;⁶⁸ and that character-testimony is admissible on this issue in these cases. It has been rejected, however, in actions for larceny;⁶⁹ assault with intent to kill,⁷⁰ and felonious homicide.⁷¹

§ 30. **Trait of exercising due care.**—In selecting servants a master must exercise reasonable care. This duty he owes not only to the public but also to fellow servants. If an injury occurs owing to failure on the part of the master to perform this duty he is liable. And to show knowledge on his part of the incompetency of the servant who causes the injury testimony of the general reputation of the latter for being incompetent is legally relevant.⁷²

On the other hand, the general reputation of the injured person for being a careful, prudent and sober man is generally not legally relevant.⁷³ Many courts hold, however, that where there are no eye-witnesses to the accident, and the

67. *Eddington v. United States*, 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467.

68. *Browder v. State*, 30 Tex. App. 614, 18 S. W. R. 197.

69. *Hays v. State*, 110 Ala. 60, 20 So. R. 322.

70. *Morgan v. State*, 88 Ala. 223, 6 So. R. 761.

71. *Morgan v. State*, *supra*. See also, *People v. Cowgill*, 93 Cal. 596, 29 Pac. R. 228.

72. *Monahan v. Worcester*, 150 Mass. 439.

73. *C. R. I. & P. Ry. Co. v. Clark*, 108 Ill. 113; *St. Ry. Co. v. Robbins*, 43 Kan. 145.

injured person is killed, this class of testimony is legally relevant.⁷⁴

§ 31. **Relevancy of negative facts to prove good character.**—Testimony of *negative* facts may be legally relevant to prove good character. Thus a person who has lived a considerable time in the same neighborhood where the accused lived may testify that he has never heard any evil reports of him;⁷⁵ or ever heard his character discussed.⁷⁶

§ 32. **Relevancy of particular facts.**—Testimony of particular facts to prove the character of a party is generally inadmissible.⁷⁷ Such testimony is considered too conjectural and therefore liable to unduly prejudice the minds of the jury. Moreover, it would introduce collateral issues, thereby complicating the case and tending to confuse the minds of the jury. This restrictive rule is applicable both to civil and crim-

74. Cases cited in note 73.

75. *Powell v. State*, 101 Ga. 9, 29 S. W. R. 309, 65 Am. St. Rep. 277; *Hussey v. State*, 87 Ala. 121, 6 So. R. 420; *Matuskevitz v. Hughes*, 26 Mont. 212, 66 Pac. 939, 68 Pac. R. 467; *State v. Grate*, 68 Mo. 22.

76. *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769; *State v. Grate*, *supra*; *Hussy v. State*, *supra*.

77. *People v. Gordon*, 103 Cal. 568, 37 Pac. R. 534; *Hirschman v. People*, 101 Ill. 568; *White v. Com.* 80 Ky. 480, 4 Ky. L. Rep. 373; *Nelson v. State*, 32 Fla. 244, 13 So. R. 361; *State v. Welsor*, 117 Mo. 570; *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. R. 772; *McCarty v. Coffin*, 157 Mass. 478, 32 N. E. R. 807; *Stalcup v. State*, 146 Ind. 270, 45 N. E. R. 334.

inal cases and when the testimony is offered by either of the parties to the litigation.⁷⁸ Moreover, it is applicable where the purpose is to show either good⁷⁹ or bad⁸⁰ character. And furthermore, it is applicable not only to a party to the litigation but also to a witness or a third party.⁸¹

In a few classes of cases, however, character-testimony of particular facts is admissible. Thus, in actions for rape, seduction, criminal conversation, etc., this class of testimony has been held admissible.⁸² In an action for rape an integral part of the crime charged is want of consent on the part of the prosecutrix; and to rebut this element testimony of prior acts of intercourse with the defendant is admissible. Moreover, some courts admit testimony of acts of immoral intercourse between her and men other than the defendant. And in an action for

78. *McCarty v. Coffin*, *supra*; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

79. *Com. v. Mullen*, 150 Mass. 394, 23 N. E. R. 51; *Howard v. State*, 37 Tex. Cr. Rep. 494, 36 S. W. R. 475, 66 Am. St. Rep. 812; *Jones v. Duchow*, 87 Cal. 109, 23 Pac. R. 256; *State v. Ferguson*, 71 Conn. 227, 41 Atl. R. 769.

80. *State v. Bysong*, 112 Ia. 419, 84 N. W. R. 505; *Murphy v. State*, 108 Ala. 10, 18 So. R. 557; *Campbell v. State*, 38 Ark. 498; *Cheney v. State*, 7 Ohio 222; *State v. Sterrett*, 71 Ia. 386, 32 N. W. R. 387.

81. *Campbell v. State*, *supra*; *Nixon v. McKinney*, 105 N. C. 23, 11 S. E. R. 154; *Frazier v. Penn. Ry. Co.*, 38 Pa. St. 104, 80 Am. Dec. 467.

82. See cases cited in foot-note 48.

seduction, the chastity of the complaining witness is an integral part of the offense charged; and some courts hold that testimony of specific acts of intercourse between her and the defendant, or between her and men other than the defendant, prior to the offense charged, is legally relevant.⁸³ Testimony of specific acts is also admissible to prove a person's mental state.⁸⁴ Again, testimony of specific acts is held admissible to show the disposition or character of an animal.⁸⁵ Thus, such testimony is admissible to show that a certain horse is vicious,⁸⁶ gentle,⁸⁷ safe,⁸⁸ kind,⁸⁹ etc.

§ 33. **Character testimony in actions of fraud.**—Mr. Greenleaf says "And generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it."⁹⁰ The contrary, however, is supported by the great weight of authority,⁹¹ and is also in

83. See cases cited in foot-note 48.

84. *Redick v. State*, 25 Fla. 112, 5 So. R. 704.

85. *Lynch v. Moore*, 154 Mass. 335, 28 N. E. R. 277; *Noble v. St. Jo.*, etc. Ry. Co., 98 Mich. 249, 57 N. W. R. 126.

86. *Lynch v. Moore*, *supra*; *Whittier v. Franklin*, 46 N. H. 23, 88 Am. Dec. 185.

87. *Lebanon, etc., Turnpike Co. v. Hearn*, 87 Tenn. 191, 1 S. W. R. 510.

88. *Todd v. Rowley*, 8 Allen (Mass.) 51.

89. *Sydleman v. Beckith*, 43 Conn. 9.

90. 2 Greenl. Evid., sec. 54.

91. *Schmidt v. N. Y. Union Mut. F. Ins.*, 1 Gray (Mass.) 529; *Powers v. Armstrong*, 62 Ark. 267, 35 S. W. R.

harmony with the better view.⁹² This class of testimony has been rejected in actions for fraudulently burning property;⁹³ fraudulently overvaluing property insured;⁹⁴ fraudulently conveying property;⁹⁵ fraudulently appropriating property;⁹⁶ maliciously burning property;⁹⁷ making false and fraudulent representations as to the solvency of another person,⁹⁸ etc. Testimony of the good character of the defendant, in a civil action charging him with fraud, may, in a measure, be logically relevant, but it is too conjectural to go to a jury. Moreover, it complicates the case and tends to divert the minds of the jury from the real issue to be decided. As said in a South Carolina case, "If in every case where an act of dishonesty is imputed the imputation may be met with such evidence, then there are few cases into which such evidence might not be introduced; trials would be insupportably tedious and the result of a trial would as often depend upon the popularity of

228; *Dudley v. McCluer*, 65 Mo. 241, 27 Am. Rep. 273; *Gebhart v. Burkett*, 57 Ind. 378, 26 Am. St. Rep. 61.

92. *Rosenagel v. Handl*, 157 Pa. St. 107, 25 Atl. R. 42.

93. *Munkers v. Ins. Co.*, 30 Ore. 211, 46 Pac. R. 850.

94. *Fowler v. Aetna Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460.

95. *Van Sickel v. Shenk*, 150 Ind. 413, 50 N. E. R. 381.

96. *Smets v. Plunket*, 1 Strob. (S. C.) 372.

97. *Barton v. Thompson*, 56 Ia. 571, 41 Am. Rep. 119.

98. *Gough v. St. John*, 16 Wend. (N. Y.) 646.

a party as upon the merits of his case."⁹⁹ This class of testimony has also been rejected in actions on contract;¹⁰⁰ for malicious mischief;¹ for criminal conversation;² assault and battery,³ and for false arrest and imprisonment.⁴ In some states, however, including Indiana,⁵ Tennessee,⁶ Minnesota⁷ and New Hampshire,⁸ the contrary view has been sustained. But upon principle, as well as authority, testimony of the good character of the defendant in a civil action for fraud, either *ex delicto* or *ex contractu*, is inadmissible.

§ 34. **Weight of character testimony.**—The weight of this class of testimony depends upon the circumstances of the particular case. Generally speaking, its probative value is not as great in civil cases as in criminal cases.⁹ Formerly, testimony of the good character of the accused was admissible only in *capital* cases; but now it

99. *Smets v. Plunket*, *supra*.

100. *Munroe v. Godkin*, 111 Mich. 183; 69 N. W. R. 244.

1. *Thayer v. Boyle*, 30 Me. 475.

2. *Pratt v. Andrews*, 4 N. Y. 493.

3. *Markey v. Angell*, 22 R. I. 343, 47 Atl. R. 882.

4. *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. R. 381.

5. *Hilker v. Hilker*, 153 Ind. 425, 55 N. E. R. 811.

6. *Cont. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. R. 497.

7. *Hein v. Holdridge*, 78 Minn. 468, 81 N. W. R. 522.

8. *Warner v. Warner*, 69 N. H. 137, 44 Atl. R. 908.

9. *State v. Daley*, 53 Vt. 442, 38 Am. Rep. 694; *Fry v. State*, 96 Tenn. 467, 35 S. W. R. 883; *Com. v. Nagle*, 157 Mass. 554, 32 N. E. R. 861.

is admissible in all criminal cases. It constitutes circumstantial evidence, and ordinarily is not considered strong evidence. On the other hand it may be sufficient to generate a doubt in the minds of the jury and turn the scale even when the crime charged is an atrocious one and the evidence tends very strongly to establish the guilt of the accused.¹⁰ But the court may not charge the jury that proof of the good character of the accused raises a reasonable doubt of his guilt;¹¹ nor that such proof is conclusive in a doubtful case.¹² Cooley, C. J., says, "Good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring conviction of innocence. In every criminal trial it is a fact which the defendant is at liberty to put in evidence; and, being in, the jury have a right to give such weight as they think it entitled to."¹³

10. *Remsen v. People*, 43 N. Y. 6; *Seymour v. State*, 102 Ga. 803, 30 S. E. R. 263; *State v. Pipes*, 65 Kan. 543, 70 Pac. R. 363; *State v. Anslinger*, 171 Mo. 600, 71 S. W. R. 1041; *Hanney v. Com.*, 116 Pa. St. 322, 9 Atl. R. 339; *Armor v. State*, 63 Ala. 173; *Edgington v. United States*, 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467.
11. *Guzinski v. People*, 77 Ill. App. 275; *Mitchell v. State*, 43 Fla. 188, 30 So. R. 803.
12. *Shields v. State*, 149 Ind. 395, 49 N. E. R. 351.
13. *People v. Garbutt*, 17 Mich.

CHAPTER III.

Confessions.

§ 1. **Definition.**—A confession is an admission by a person that he is guilty of participating in the commission of a particular crime.

§ 2. **Classification.**—Confessions are classified as voluntary and involuntary. They are also classified as judicial and extra-judicial.

§ 3. **Authority for admissibility.**—Confessions were admissible at common law. Their use was first regulated by statute in the reign of Philip and Mary. At present statutes regulate their use to a considerable extent.

§ 4. **Voluntary confessions.**—A confession to be admissible in evidence must be voluntary. The element of spontaneity is of vital importance.²

A voluntary confession, in its technical sense, is one that is made without inducement by a person in authority, of hope of reward or fear of punishment as regards the alleged crime; or one that is made without such inducement,

1. Clayton v. State, 31 Tex. Cr. Rep. 489; Hopt v. People, 110 U. S. 574; Wilson v. United States, 162 U. S. 613; Robinson v. People, 159 Ill. 115, 42 N. E. R. 375; Redd v. State, 69 Ala. 255, 259; State v. Carrick, 16 Nev. 120, 130; People v. Chaplean, 121 N. Y. 266, 24 N. E. R. 469.

2. People v. McMahon, 15 N. Y. 384.

caused by threatened mob violence,³ a threat of corporal violence by a person in authority, or actual corporal violence by a private person.

§ 5. **A person in authority.**—To render a confession involuntary it must be induced by a person who is endowed with authority to make the promise or threat. All persons connected with the prosecution are considered qualified. They include the prosecuting attorney, the officer who has custody of the accused and the magistrate connected with the prosecution.⁴ In England the victim of the crime, if living, is qualified. This rule obtains in many of the state courts. It does not obtain, however, in the federal courts.

The fact that a person occupies the relation of parent or master of the accused does not qualify him as a person in authority.⁵ Nor does the fact that he occupies a clerical relation towards him. Thus the chaplain of the jail in which the accused is incarcerated is not a person in authority.

When the accused has reasonable grounds to believe that the promise or threat is made by a person in authority, and makes the confession in

3. *Whitley v. State*, 78 Miss. 255, 28 So. R. 852; *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. ed. 568.

4. *State v. Hedgepeth*, 125 Mo. 14; *Bartley v. People*, 156 Ill. 264; *State v. Harrison*, 115 N. C. 706; *Fussell v. State*, 93 Ga. 450.

5. *Com. v. Howe*, 2 Allen (Mass.) 153; *Shiffell's Case*, 14 Gratt. (Va.) 652.

consequence of such belief, the confession is inadmissible.⁶

§ 6. **Application of promise or threat.**—To render a confession involuntary it must be induced by the promise or threat.⁷ Although the promise or threat is made by a person in authority if the accused subsequently makes the confession wholly independent of it the confession is admissible. In such case, however, it must clearly appear that the promise or threat exercised no influence on the mind of the accused.⁸

When the confession is made prior to the promise or threat, or after the promise or threat has been withdrawn, it is, of course, admissible.

When a confession is induced by a threat or promise, subsequent similar confessions, made even to different persons, are presumed inadmissible. But when no confession is made to the party who offers the inducement and the accused subsequently makes a confession to a different party it is presumed admissible.

When the accused inadvertently makes a confession based upon a mistake of fact the confession is admissible.

6. *Com. v. Knapp*, 9 Pick. (Mass.) 496; *United States v. Knott*, 1 McLean 499.
7. *Com. v. Cuffee*, 108 Mass. 305; *Pierce v. United States*, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454.
8. *Reg. v. Clewes*, 4 Car. & P. 221; *Com. v. Myers*, 160 Mass. 530, 36 N. E. R. 481; *State v. Drake*, 82 N. C. 592, 596.

§ 7. Artifice or deception used.—The fact that artifice or deception is used in procuring a confession does not render it inadmissible.⁹

§ 8. Promise of pardon, etc.—A confession procured by a promise of pardon, release from arrest, lighter punishment, better jail treatment, cessation of prosecution, etc., is inadmissible.

§ 9. Advised to confess, tell the truth, etc.—Some courts hold that this kind of an inducement renders the confession inadmissible,¹⁰ while other courts hold the contrary.¹¹

§ 10. Accused assured that his statement will be used.—The fact that the accused is assured that what he says will be used for him, or against him, does not render his confession inadmissible:

§ 11. Moral or religious exhortations.—The fact that a confession is induced by moral or religious exhortations does not render it inadmissible.¹²

§ 12. Confessions under oath.—The fact that a confession was made under oath at a former

9. *People v. McCallam*, 103 N. Y. 587, 598, 9 N. E. R. 502; *State v. Mitchell*, 61 N. C. 447; *Burton v. State*, 107 Ala. 108, 18 So. R. 284; *State v. Walker*, 98 Mo. 95, 113, 9 S. W. R. 646 and 11 S. W. R. 1133; *Rex v. Derrington*, 2 Car. & P. 418.

10. *Com. v. Nott*, 135 Mass. 269. See also 1 Greenl. Evid., sec. 219; 2 East P. C. 659.

11. *State v. Meekins*, 41 La. Ann. 543; *State v. White*, 17 Kan. 487; *State v. Kornstett*, 62 Kan. 221, 22 Pac. R. 805.

12. *Com. v. Drake*, 15 Mass. 161; *Aaron v. State*, 37 Ala. 106; *State v. Potter*, 18 Conn. 166.

trial or proceeding does not render it inadmissible.¹³ But if the accused was compelled to testify at the former trial, in violation of his constitutional right to refuse to do so, the confession is inadmissible. And if a witness, who is summoned to testify at the preliminary hearing of the accused after his arrest, is not apprised of his constitutional right to refuse to testify to anything which may tend to criminate him, a confession of his own guilt is inadmissible in a subsequent prosecution against him.¹⁴ But the mere fact that he fails to exercise his privilege to refuse to answer when the answer tends to criminate him does not render the confession involuntary.

§ 13. Accused under arrest. — The fact that the accused is under arrest at the time the confession is made does not render it inadmissible.¹⁵

§ 14. Improper inducement terminated after

13. *State v. Campbell*, 73 Kan. 688, 85 Pac. R. 784, 9 L. R. A. (N. S.) 533; *Dickerson v. State*, 48 Wis. 288, 292, 4 N. W. R. 321; *Hill v. State*, 64 Miss. 431, 440, 1 So. R. 494; *Com. v. Reynolds*, 122 Mass. 454, 458; *People v. Chaplean*, 121 N. Y. 266, 276, 277, 24 N. E. R. 469; *State v. Witham*, 72 Me. 531, 533, 534; *State v. Sortor*, 52 Kan. 531, 34 Pac. R. 1036; *State v. Finch*, 71 Kan. 793, 81 Pac. R. 494.
14. *People v. Mondon*, 103 N. Y. 211, 8 N. E. R. 496, 57 Am. Rep. 709.
15. *State v. Clifford*, 86 Ia. 553; *State v. Gilman*, 51 Me. 209; *Rizzolo v. Com.*, 126 Pa. St. 124; *People v. Chacom*, 102 N. Y. 669; *Jackson v. State*, 59 Ala. 249; *State v. George*, 15 La. Ann. 145.

confession.—A confession induced by an improper promise or threat which is subsequently made nugatory may be inadmissible. Thus a promise by the chief of police that the accused will be released if he will confess and disclose his accomplice, who is the principal offender, renders the confession inadmissible although the prosecuting attorney informs him, after he makes the confession, that the promise of the chief of police was unauthorized and is repudiated.

§ 15. **Conduct of accused induced by promise or threat.**—The rule which excludes involuntary confessions is not applicable to *conduct* as distinguished from words. Thus, testimony of incriminating conduct of the accused induced by a promise or threat is admissible.¹⁶ Such testimony is original circumstantial evidence.

The incriminating conduct is not technically a confession. Moreover, it is prejudicial error for the court to charge the jury that it is.¹⁷

16. *State v. Edwards*, 13 S. C. 30; *State v. Hill*, 134 Mo. 663, 36 S. W. R. 223; *Kelly v. People*, 55 N. Y. 365, 14 Am. Rep. 342.
17. *State v. Edwards*, *supra* (In this case the trial court charged the jury "That, if a party hears a criminal charge against himself, made in his presence, and says nothing, it is an admission on his part, and in the eye of the law the party accepts that charge as his confession." Held error. "The effect of this charge was to give the silence of the parties the legal force and effect of confession of guilt. It must, in this respect, be distinguished from the proposition that the con-

Furthermore, circumstances may render testimony of the conduct inadmissible. Thus, where a witness makes incriminating statements against the accused in a former proceeding the latter's silence may not be used against him.¹⁸

§ 16. Criminating statements of facts.—The rule which excludes involuntary confessions is not applicable to criminating statements of facts which fall short of being confessions of guilt. Such statements are merely admissions, and their legal relevancy is governed by the rules applicable to admissions.

§ 17. Facts discovered as a result of an involuntary confession.—Facts discovered as a result of an involuntary confession, and which are material to the issue, may be shown.¹⁹ Moreover, the courts of many states hold that the confession is thereby rendered admissible in so far

duct of the parties under accusation of crime may be given to the jury as circumstances to be weighed in connection with the question of guilt or innocence.”).

18. *Brogles v. State*, 47 Ind. 251. See also *Slatterly v. People*, 76 Ill. 217 (In this case the accused had promised that if the interview with his father-in-law were accorded him he would keep his temper and be on his good behavior. At the interview his father-in-law made incriminating statements against him and he kept silent. The court held that testimony of his silence was inadmissible.).

19. *Lowe v. State*, 88 Ala. 8. 7 So. R. 97; *Duffy v. People*, 26 N. Y. 588, 590; *Gates v. People*, 14 Ill. 433, 437. R. v. Gould, 9 Car. & P. 364.

as it is confirmed by the discovered facts.²⁰ The weight of authority, however, is to the contrary.

§ 18. **Whole confession introduced.**—When the prosecution introduces part of a confession the accused is entitled to have the rest of it introduced although that part is favorable to him.²¹

§ 19. **Substance ~~in~~admissible.**—When the witness is unable to give the exact words of the confession he may give the substance of it. And when he hears, or remembers, only part of the confession he may testify as to that part.²²

§ 20. **Other parties implicated.**—When the confession implicates other persons as well as the accused the whole confession is admissible but is binding only on the accused.

§ 21. **Accused intoxicated.**—The fact that the accused is intoxicated when he makes the confession does not render it inadmissible unless the intoxication renders him wholly irresponsible mentally.²³

§ 22. **Accused asleep.**—Words spoken by the accused while asleep are inadmissible. His condition at that time renders him mentally irresponsible.²⁴

20. *Lowe v. State*, 88 Ala. 8.

21. *McAdory v. State*, 62 Ala. 154, 160; *People v. Gelabert*, 39 Cal. 663; *Berry v. Com.*, 10 Bush (Ky.) 15.

22. *Com. v. Pitsinger*, 110 Mass. 101; *Levison v. State*, 54 Ala. 101.

23. *Com. v. Howe*, 9 Gray (Mass.) 110; *Eskridge v. State*, 25 Ala. 30.

24. *People v. Robinson*, 19 Cal. 40.

§ 23. **Only external influences considered.**— In determining whether a confession is voluntary or involuntary, only external influences are given consideration. Thus when the accused offers to turn state's evidence, his offer accepted, a promise of protection given him, and he makes a confession which implicates himself and his accomplices but subsequently refuses to testify against them, his confession is admissible against him. As said by Putnam, J., in the celebrated Knapp case, "He had solicited and obtained the protection of the government, and was at liberty to accept it on those terms, or to stand upon his defense. We cannot perceive how the prisoner, thus situated, could have any motive falsely to accuse himself, although he might have a motive to continue his false accusation against his accomplices. And besides, if any such motive could be supposed to operate, it was a new motive, and not arising from external influence. And it is no objection to the admission of a confession that it was made from interested motives, and with the hope of favor, if the motive is not excited by external influence."²⁵

§ 24. **Confessions of other crimes.**— It has

25. *Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534 (In this case two brothers were convicted of murder and executed. It came to light later that had the brother who confessed testified against his brother as he agreed to do, and had all the facts been brought out, both would have been acquitted.)

been held that confessions of other crimes by the accused are inadmissible to impeach his character or credibility.²⁶

§ 25. Confession may be oral or in writing.—A confession may be oral as well as in writing. If it is in writing it must be signed by the party who makes it, or be acknowledged by him. In case it is both oral and in writing the best evidence rule is applicable. The oral confession in such case is secondary evidence and inadmissible unless a proper foundation is laid for its introduction. This is done by showing that the written confession is lost, that a reasonable search was made for it and that the search was unsuccessful; or, that the written confession was inadvertently destroyed, or is in the hands of the adverse party who refuses to produce it.

§ 26. Promise by private detective.—Hope of reward or fear of punishment inspired by a private detective does not render a confession involuntary.²⁷

§ 27. Promise communicated to accused indirectly.—It is not essential that the person in authority communicate directly his promise to the accused. It is sufficient if the intermediary is a person who would naturally be supposed to do so.²⁸

§ 28. Witness speaks a different language.—If the witness speaks a different language from

26. *State v. Symonds*, 57 Me. 148.

27. *Early v. Com.* 86 Va. 921.

28. *Rex v. Harding*, 1 Ann., M. & O.

that spoken by the accused the burden is on the prosecutor to show that the language used by the accused was understood by both.²⁹

§ 29. Accused compelled to do incriminating acts.—While the accused may refuse to make incriminating statements against himself, some courts hold that he may be compelled to do acts which constitute circumstantial evidence of his guilt and that testimony of such acts is admissible.³⁰ Other courts, however, hold the contrary.³¹

§ 30. Presumption and burden of proof. — In the absence of any suspicious circumstance a confession is presumed voluntary.³²

29. *People v. Minisci*, 46 Hun. (N. Y. 682; *Berry v. Com.* 10 Bush (Ky.) 15; *People v. Gillebert*, 39 Col. 663.

30. *State v. Garrett*, 71 N. C. 85, 17 Am. Rep. 1 (In this case the accused girl, charged with the murder of another girl, claimed that deceased was accidentally burned, and that she, the accused, got her hand burned in trying to subdue the flames. The coroner compelled her to unwrap her hand and show it to a physician, and it was found that her hand had not been burned at all. Testimony of this fact was held admissible); *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493 (In this case the accused, who was charged with stealing corn from a field was compelled by the officer who arrested him to go to the field and put his foot in the tracks there. Testimony of this fact and also of the fact that his foot exactly fitted the tracks was held admissible as circumstantial evidence.)

31. *People v. McCoy*, 45 How. Prac. (N. Y.) 216; *United State v. Wong Quong Wong*, 94 Fed. R. 832. See also 13 Har. Law Rev. 302.

32. *Hopt v. Utah*, 110 U. S. 594; *State v. Davis*, 34 La. Ann. 35. Burden of proof in true sense not effected.)

By the weight of authority the burden is on the prosecution to show that it is voluntary.³³ This is the English rule.³⁴ Some courts, however, hold that the burden is on the defendant to show that it is involuntary.³⁵ This view, however, is not correct upon principle.

§ 31. Confessions admissible only against parties who make them.—Very generally, confessions may be used only against the parties who make them.³⁶ This rule is applicable even in the case of joint crimes and where the defendants are jointly tried. In criminal conspiracy cases, however, a confession made by one of the joint conspirators during the pendency of the conspiracy and in furtherance of it is binding on all the conspirators.

§ 32. Confession by third party.—A confession by a third party that he alone is guilty of the crime for which the accused is on trial is inadmissible in favor of the accused. Moreover, if the confession of the third party is also a dying declaration it is not admissible as such in favor of the accused.³⁷

§ 33. Functions of court and jury.—It is the function of the court to decide the question of admissibility of the confession, and the function

33. *Roesel v. State*, 62 N. J. L. 216.

34. *R. v. Thompson*, 2 Q. B. D. 12.

35. *Com. v. Knapp*, *supra*.

36. *Robinson v. Robinson*, 1 Sw. & Tr. 362; *State v. Rinehart*, 106 N. C. 787.

37. *Mitchell v. Com.* 12 Ky. L. Rep. 458, 14 S. W. R. 489.

of the jury to decide its weight in case it is admitted. The preliminary examination, in determining the question of admissibility of the confession, should be conducted in the absence of the jury.³⁸ The attorney for the defendant is entitled to examine the witness who is called to testify to the confession in regard to matters which pertain to its admissibility.³⁹ This examination should precede his examination in chief.

§ 34. **Weight accorded confessions.** — Upon this point the authorities are in conflict. According to Mr. Foster⁴⁰ and Sir William Blackstone⁴¹ confessions are the weakest and most suspicious of all testimony. According to Chief Baron Eyre⁴² they are deserving of the highest credit. As a rule, more credit is given to written confessions than to oral ones. It may be said, however, that a confession, oral or written, voluntarily and deliberately made by a person worthy of credit, and satisfactorily proved, is, as a rule, entitled to much weight.

38. *Harter v. State*, 95 Mo. 199.

39. *State v. Drake*, 82 N. C. 592.

40. Foster, *High Treason*, chap. 3, sec. 8.

41. 4 Blk. Com. 357.

42. 1 Leach 263.

CHAPTER. IV.

Hearsay Testimony.

§ 1. **Definition.**—Hearsay testimony is testimony which depends solely for its truth or falsity in the first instance upon the statement of some person other than the witness, and has, in and of itself, no evidentiary force.¹

§ 2. **Application of the rule against hearsay.**—As a general rule, hearsay testimony is not admissible. This rule, however, has several important exceptions which are discussed in subsequent chapters. It is applicable to both oral and written statements. It is confined, however, to *testimonial* assertions.

§ 3. **Reasons for excluding hearsay testimony.**—There are several reasons for excluding hearsay testimony, the chief of which are the following: (1) the original statement is not made under oath; (2) no opportunity is afforded the adverse party to cross-examine the original party who makes the statement; and (3) no opportunity is given the jury to observe his demeanor when making it.

§ 4. **Apparent exceptions to the rule against hearsay.**—There are several classes of statements that are characterized as apparent exceptions to the rule against hearsay. Very generally, however, they constitute original evidence and the rule against hearsay does not ap-

1. Hughes on Evidence, p. 51.

ply to them. The next three sections pertain to this class of testimony.

§ 5. **The making of the statement a material fact.**—When a main fact in issue, or a material evidentiary fact, is *what was said*, and not its truth or falsity, testimony of what was said is original evidence and not hearsay. In such case the statement is not used testimonially. Thus in an action for slander a main fact in issue is usually the making of the alleged statement; and testimony of this fact, by a party who heard the statement, is original evidence.² Again, when the intent or motive of a person is a material evidentiary fact, testimony of statements by him indicating his intent or motive is original circumstantial evidence. Thus in a homicide case where a main fact in issue is whether the deceased was killed by the accused or committed suicide, testimony of statements by the deceased, made shortly before his death, that he intended to commit suicide, is original circumstantial evidence. Some courts hold, however, that such statements, to be admissible in evidence, must constitute part of the *res gestae*.³ The true rule, however, is that such statements are legally relevant if the intention concerning which they are made is a material evidentiary fact.⁴

2. Bacon v. Towne, 58 Mass. 217; Gallaway v. Burr, 32 Mich. 331; Wicker v. Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75.

3. Siebert et al. v. The People, 143 Ill. 371.

4. Com. v. Trefethen, 157 Mass. 180.

§ 6. **Market values.**—Statements as to the market values of personal property constitute another apparent exception to the rule against hearsay.⁵ The market value of goods, as defined by the Supreme Court of the United States, is “the price at which they are fully offered in the market to all the world; such prices as dealers in the goods are willing to receive and purchasers are made to pay.”⁶ Statements of the market values of personal property, made thru a medium which the people generally rely upon, are usually deemed legally relevant. Thus market reports contained in periodicals which publish regularly current prices are usually considered legally relevant. As regards the legal relevancy of market reports contained in newspapers the decisions are not harmonious. As a general rule, however, when satisfactory proof is given of the mode of acquiring information upon which the reports are based the reports are admissible. But mere quotations from other newspapers, or reports based upon information furnished by parties who have not the means of procuring it, are not admissible.⁷

§ 7. **General reputation.**—General reputation is also treated as an apparent exception to the rule against hearsay. But, as stated in § 2, Chapter II. Part I. general reputation is a fact and not hearsay.

5. *Nash v. Clason*, 163 Ill. 409.

6. *Clignet's Champagne*, 3 Wall. (U. S.) 125.

7. *Whelan v. Lynch*, 60 N. Y. 469, 473; *Norfolk & W. Ry. Co. v. Reeves*, 97 Va. 284, 33 S. E. R. 606.

CHAPTER V.

Real Exceptions to the Rule Against Hearsay.

§ 1. **Origin of the hearsay rule.**—The rule against hearsay had its origin in the development of the modern jury system.

Several of the so-called exceptions to the rule against hearsay existed as independent rules long before the rule itself came into being. Among these are dying declarations, shop-book entries, entries made in the regular course of business and ancient documents.

§ 2. **Importance of this field.**—What are characterized as real exceptions to the rule against hearsay occupy a large and important field in the law of evidence. They include statements made under oath in prior proceedings, dying declarations, declarations relating to pedigree, declarations relating to matters of public or general interest, public documents, ancient documents, declarations against interest by persons since deceased, shop-book entries, entries made in the regular course of business, declarations relating to the mental or physical condition of the declarant and declarations relating to, or forming part of, the *res gestae*. These various classes of real exception to the rule against hearsay are next discussed in the order given, a chapter being devoted to each exception.

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CHAPTER VI.

Statements Made Under Oath in Prior Proceedings.

§ 1. **Statements under oath.**—Within certain limitations, statements made under oath in prior actions or proceedings are admissible. These comprise testimony given at a former trial and depositions.

§ 2. **Testimony given at former trials.**—Under the following conditions testimony given under oath at a former trial is admissible. The witness who gave it must be dead, or mentally incompetent, or physically incapable of being present, or kept away by the adverse party, or (in civil cases) without the jurisdiction of the court, in which case it must appear that a reasonable effort has been made, without success, to produce him.

It is also essential that the party against whom the testimony was given at the former trial had the right and the opportunity to cross-examine the witness; that the questions in issue at the former trial were substantially the same as those in issue at the present trial, and relate to substantially the same points in issue at both trials; that the two trials (in civil cases) be between the same parties or their representatives

in interest, or (in criminal cases) be against the same party and relate to the same crime.¹

§ 3. **Mode of proving testimony given at former trial.**—At common law the notes of the court stenographer are not admissible. They may be used, however, to refresh memory. In many states, however, the notes themselves, when duly authenticated, are made admissible either by statute or rules of court; and in such cases they constitute the best evidence.²

If the testimony is not written down, or the stenographer's notes are inadmissible, any person who heard and remembers the testimony, and is a competent witness, may testify to it.³ And in such case it is sufficient, as a general rule, both in civil and criminal cases, to give the *substance* of the testimony.⁴ In a few jurisdictions, however, including New York and Massachusetts, the courts hold that it is essential to give at least the substance of the *language* of the testimony.

§ 4. **Depositions.**—Depositions are usually treated as constituting an exception to the rule against hearsay. Strictly speaking, however,

1. Wright v. Doe de Tatham, 1 Adol. & Ell. 3, 19; Morgan v. Nicholl, L. R. 2 C. P. 117; Yale v. Comstock, 112 Mass. 267; United States v. Macomb, 5 McLean (U. S. C. C.) 286.

2. Jackson v. State, 81 Wis. 127.

3. Clark v. Vorce, 15 Wend. (N. Y.) 193.

4. Brown v. Com. 73 Pa. St. 321; Jackson v. Powers, 40 Vt. 611; Gildersleeve v. Caraway, 10 Ala. 260.

they do not. The mode of taking them and their admissibility in evidence depend upon statutory provisions. They are made under oath and an opportunity is afforded the adverse party to cross-examine the deponents. And while it is true that the jury are not afforded an opportunity to observe the demeanor of the deponents while making the depositions the latter are taken pursuant to the provisions of the statutes for the very purpose of reading them to the jury.

§ 5. **Extension of the rule.**—Some courts hold that the rule which allows testimony given under oath in a former proceeding is applicable to preliminary and arbitration proceedings.⁵ In no case, however, is it applied where the adverse party has not the right and opportunity of cross-examination. Nor is it applied where the issues and parties are substantially different. Thus testimony given under oath at a coroner's inquest is not admissible in a civil action for damages based upon the same facts. In such case both the issues and parties are different.⁵

5. *United States v. Macomb, supra.*

CHAPTER. VII.

Dying Declarations.

§ 1. **In general.**—Dying declarations are hearsay. Within certain restrictions, however, they

are admissible in evidence and constitute a real exception to the rule against hearsay.

§ 2. **Scope of their admissibility.**—Formerly, dying declarations were held admissible both in civil and criminal cases.¹ Today, however, both in England and in this country, except in Kansas,² they are admissible only in criminal cases. Moreover, in the absence of statutes, the crime charged must be either murder or manslaughter.³

§ 3. **Grounds of admissibility.**—The two grounds assigned for admitting dying declarations in evidence are (1) the solemnity of the occasion and (2) the necessity of the case. The former is considered the equivalent of an oath. The latter is justified on the ground that otherwise manslaughterers would escape justice for lack of evidence.

§ 4. **Statement by Lord Chief Baron Eyre.**—In commenting on the admissibility of dying declarations, Lord Chief Baron Eyre said: "they are declarations made in extremity, when the party is at the point of death, and when every motive to falsehood is silenced, and the mind

1. *Wright v. Littler*, 3 Burrows 1244; *Stark. Evid.* (7th ed.) 22; *Phil. Evid.* (1st Am. ed.) 201.
2. *Thurston v. Fritz*, 91 Kan. 468, 138 Pac. R. 625, 50 L.R.A.
3. *Johnson v. State*, 50 Ala. 456; *West v. State*, 7 Tex. App. 150; *Wilson v. Boerem*, 15 Johns. (N. Y.) 286; *Railing v. Com.*, 110 Pa. St. 100, 106, 1 Atl. R. 314; *State v. Harper*, 34 Ohio St. 78, 35 Am. Rep. 596; *Marshall v. Chicago, etc. Ry. Co.*, 48 Ill. 497.

is induced by the most powerful considerations to speak the truth. A situation so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice."

§ 5. Illogical application by courts.—In admitting dying declarations in evidence courts do so arbitrarily rather than logically. If the former of the two grounds of admissibility, stated in § 3, is the true one, dying declarations should be held admissible in civil as well as in criminal cases. Their admissibility is restricted, however, to homicide cases. Again, if the latter of those two reasons is the correct one dying declarations should be rejected in homicide cases where there are eye witnesses to the tragedy. They are held admissible, however, irrespective of the number of eye witnesses.

§ 6. Requisites of admissibility.—To render a statement admissible as a dying declaration the following conditions must exist. The declaration must be made by a person competent to testify. The declarant must be dead. He must have been in extremis when he made the statement. He must have been, at that time, conscious of his impending death. The subject of the investigation must be his own homicide; and the subject of the declaration must be the cause of it and the attendant circumstances.⁴

4. Pulliam v. State, 88 Ala. 1; Archibald v. State, 122 Ind. 122; Peak v. State, 50 N. J. L. 179; Dixon v. State. 13

§ 7. **Proof of consciousness of impending death.**—Proof of the declarant's consciousness of his impending death may comprise both direct and circumstantial evidence. Statements by the declarant upon this point are admissible, and inferences from the nature of the wound, from acts on the part of the declarant, etc., may be given weight in determining this question.⁵

§ 8. **Two homicides from same act.**—When two homicides result from the same act, and the accused is on trial for one of them, the question sometimes arises whether the dying declarations of the other deceased are admissible or not. The decisions upon this point are conflicting; but according to the better view, which is correct upon principle, the declarations are admissible.⁶

§ 9. **Vague declarations.**—Dying declarations that are vague and indefinite, or incomplete in themselves, are inadmissible.⁷

Fla. 636; State v. Swift, 57 Conn. 496; State v. O'Brien, 81 Ia. 88; Sullivan v. Com., 93 Pa. St. 284, 296; People v. Lanogan, 81 Cal. 142; State v. Simon, 50 Mo. 370.

5. Westbrook v. The People, 126 Ill. 81; State v. Russell, 13 Mont. 164; Mills v. State, 74 Ala. 21; Com. v. Roberts, 108 Mass. 296; Com. v. Brewer, 164 Mass. 577; Murphy v. People, 37 Ill. 447; Dumas v. State, 62 Ga. 58; Kilpatrick v. Com., 31 Pa. St. 198, 215.
6. The State v. Terrell, 12 Richardson (S. C.) 321, 13 Am. Rep., bot. p. 745; Rex v. Baker, 2 Moody & R. 53.
7. State v. Baldwin, 79 Ia. 714; People v. Olmstead, 30 Mich. 431.

§ 10. **Declarations of opinion.**—Dying declarations which constitute mere statements of opinion are inadmissible.⁸ To be admissible the declaration must constitute statements of fact. A few courts, however, have relaxed this rule when the statements favored the accused.⁹

§ 11. **Interval between declaration and death.**—The fact that the declarant lives for several days after making the declaration does not render it inadmissible. As said by Ames, J., “The rule as to the admissibility of dying declarations does not require that they should have been made while the sufferer was literally breathing his last. It is enough that they were made when he understands that his injuries are fatal and believes his death to be near at hand. If he believed himself to be in a dying state, it is immaterial that he lived four days after making the declaration.”¹⁰

§ 12. **Form of the declaration.**—A dying declaration may be oral or in writing.¹¹ It may even be communicated by signs.¹² It may

8. Boyle v. State, 105 Ind. 469.

9. State v. Ashworth, 50 La. Ann. 94.

10. Com. v. Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762. See also Com. v. Roberts, 108 Mass. 296; Fulcher v. State, 28 Tex. App. 465.

11. State v. Gray, 55 Kan. 135, 39 Pac. R. 1050; State v. Arnold, 35 N. C. 184; Kilgore v. State, 74 Ala. 1; State v. Kindle, 47 Ohio St. 358, 24 N. E. R. 485; Mockabee v. Com., 78 Ky. 380.

12. Com. v. Casey, 11 Cush. (Mass.) 417, 59 Am. Dec. 150; Dunn v. The People, 172 Ill. 582.

be spontaneous or in reply to questions. If the declarant has hopes of living when he makes a declaration in writing and verifies it orally after losing all hope of living it is admissible.¹³ When a written dying declaration is lost secondary evidence is admissible to prove its contents. But a dying declaration reduced to writing and signed by the declarant is within the best evidence rule.¹⁴

§ 13. Impeachment of dying declarations.—Dying declarations are impeachable the same as other evidence. This may be done by showing that the declarant's general reputation for truth and veracity was bad, that he made contradictory statements, etc. This impeaching testimony may be rebutted by introducing testimony corroborative of the dying declarations.¹⁵

§ 14. Burden of proof.—When dying declarations are offered in evidence they are presumed to be admissible; and when objection is made to them the burden of proof is on the objector to show the contrary.

§ 15. Function of court and jury.—When objection is made to the admissibility of a dying declaration it is the function of the court to decide the question.¹⁶ The jury, during the inves-

13. *State v. Tweedy*, 11 Ia. 350.

14. *Wilson v. Com.*, 22 Ky. Law Rep. 1251, 60 S. W. R. 400; *Dunn v. The People*, *supra*.

15. *Tracy v. People*, 97 Ill. 101.

tigation of this question, should not be present. This matter rests, however, in the sound discretion of the court.¹⁷

§ 16. **Weight of dying declarations.**—For several reasons dying declarations are entitled to less weight than the testimony of a living witness. Thus the declarant has no fear of being prosecuted for perjury. The witness who testifies to the declaration has less fear of being prosecuted for perjury than in ordinary cases, since he has no fear of being contradicted by the declarant. The defendant is not afforded the opportunity to cross-examine the declarant. The jury are not afforded the opportunity to observe the demeanor of the declarant when making the declaration. The declarant's mental and physical condition at the time he makes the declaration naturally tends to make his statement less reliable.¹⁸

§ 17. **This class of testimony not unconstitutional.**—It has been asserted many times that to admit this class of testimony is a violation of the federal constitution, for the reason that the ac-

16. *Com. v. Bishop*, 165 Mass. 148, 42 N. E. R. 560; *State v. Elliott*, 45 Ia. 486; *People v. State*, 104 N. Y. 491, 504, 10 N. E. R. 873, 58 Am. Rep. 537; *Donnelly v. State*, 26 N. J. L. 463, 503; *State v. Simon*, 50 Mo. 370.

17. *Starkey v. People*, 17 Ill. 16; *North v. People*, 139 Ill. 81; *Montgomery v. State*, 11 Ohio, 424.

18. *State v. Evans*, 124 Mo. 397; *State v. Banister*, 35 S. C. 290; *Bates v. Com.*, 14 Ky. L. Rep. 177; *People v. Knapp*, 148 N. Y. 631; *The State v. Mathes*, 90 Mo. 571. See also 10 Harvard Law Review 518.

cused is denied his constitutional right to meet the witnesses against him "face to face." The courts, for different reasons, have always held, however, that the objection is not tenable.¹⁹

§ 18. **Proof of identity of accused.**—The identification of the accused is a circumstance pertaining to the death of his victim; and a dying declaration of the latter upon this point, when a statement of fact and not merely an expression of opinion, is admissible.²⁰

§ 19. **Substance of declaration sufficient.**—It is not essential to the admissibility of a dying declaration that the exact words be given. Where this cannot be done the substance of the words will suffice. As said in an Illinois case, "A conscientious witness will rarely undertake, under oath, to give the exact words of another, spoken at another time, and on a different and remote occasion. The substance of the words, if the exact words cannot be given, is all the law requires."²¹

§ 20. **Declaration must relate to declarant's homicide.**—The declaration must relate to the declarant's own homicide. Thus a declaration by a dying person that he alone is guilty of a given murder is not admissible where another

19. *Jackson v. State*, 81 Wis. 127; *Com. v. Richards*, 18 Pick. (Mass.) 434; *Hill v. Com.*, 2 Gratt. (Va.) 607.

20. *Com. v. Roddy*, 184 Pa. St. 274; *McLean v. State*, 16 Ala. 672; *Brotherton v. The People*, 75 N. Y. 159.

21. *Starkey v. People*, 17 Ill. 16. See also *Montgomery v. The State*, 11 Ohio 424.

person is on trial for the victim's death.²² Nor is it admissible as a confession since it is not made by the person who is on trial for the homicide.

§ 21. **Competency of declarant.** — The declarant must possess the essentials of a competent witness. It must appear that he would have been competent to testify if alive.²³ If too young to understand the nature of an oath and the idea of future punishment his declaration is inadmissible.²⁴ Lack of religious belief, however, does not exclude dying declarations.²⁵ Nor does the marital relation exclude the dying declaration of one spouse against the other.²⁶

22. *Mitchell v. Com.*, 12 Ky. L. Rep. 458, 14 S. W. R. 489.

23. *Binns v. State*, 48 Ind. 311; *Wroe v. State*, 20 Ohio St. 460; *State v. Williams*, 67 N. C. 12; *Whitely v. State*, 38 Ga. 50, 70; *Ben v. State*, 37 Ala. 103; *Goodall v. State*, 1 Ore. 338.

24. *R. v. Pike*, 3 Car. & P. 598; *R. v. Drummond*, 1 Lea. C. C. 337.

25. *Boyle v. State*, 97 Ind. 322; *Com. v. Mathews*, 89 Ky. 287; *Jones v. State*, 52 Ark. 345; *Hill v. State*, 64 Miss. 431.

26. *Moore v. State*, 12 Ala. 746; *State v. Belcher*, 13 S. C. 459.

CHAPTER VIII.

Declarations Relating to Pedigree.

§ 1. **In general.**—The term pedigree is used in a broad sense. It embraces matters of descent and relationship and also material evidentiary facts pertaining to them, such as birth, marriage and death.

§ 2. **Basis of admissibility.**—The basis of admissibility of this class of declarations is the fact that they constitute the natural expressions of persons who possess knowledge of matters of pedigree and who, owing to the relation that exists between them and the parties concerning whom the declarations are made, are naturally desirous that such declarations state the truth. As said by Lord Chancellor Eldon, "Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in bibles and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of the truth."¹

§ 3. **Form of the declaration.**—The form of the declaration is immaterial. It may be oral, in writing, or even manifested by conduct.

1. *Whitlocke v. Baker*, 13 Ves. 514. See also *Fulkerson v. Holmes*, 117 U. S. 389; *People v. Fulton Ins. Co.*, 25 Wend. (U. S.) 222.

Thus in the celebrated Berkely Peerage case the court held that the conduct of a parent towards his son may amount "to a daily assertion that the son is legitimate."²

§ 4. **Essential conditions.**—To render this class of hearsay admissible it is essential to show that the declarations were made by a person qualified to speak; that they were made *ante litem motam*; that the declarant is dead, and that (according to the English rule) the declarations relate to a question of pedigree material to the issue.

§ 5. **Essential qualification of the declarant.**—The declarant must have been related to the person concerning whom the declarations were made either by blood or marriage, and if by marriage the parties must have been man and wife.³

Upon this point the early English rule was more liberal than the modern one. As said by Lord Eldon, "The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely from their domestic habits and connections that

2. 4 Camp. 416. See also *Hargrave v. Hargrave*, 2 Car. & K. 701; *Morris v. Davies*, 5 Clark & F. 163, 241.

3. *Monkton v. Atty. Gen.*, 2 Russ. & M. 165; *Robson v. Atty. Gen.*, 10 Clark & F. 500; *People v. Fulton Ins. Co.*, *supra*; *Buttrick v. Tilton*, 155 Mass. 461; *Conn. Mut. Life Ins. Co. v. Schwenk*, 94 U. S. 593; *Barnum v. Barnum*, 43 Md. 251, 304; *Stein v. Bowman*, 13 Peters, 209.

they are speaking the truth, and that they could not be mistaken."⁴

While this early rule seems a sensible one the courts very generally, both in England and in this country, adhere strictly to the former one.⁵

§ 6. Remoteness of the relationship.—When the parties are related by consanguinity the remoteness of the relationship, so far as the admissibility of the declarations is concerned, is immaterial.⁶ It may, however, effect their weight. When the parties are related by affinity they must be, as previously stated, husband and wife. In a celebrated case upon this point the supreme court of the United States held that a wife's sister is not qualified to make this class of declarations.⁷

The declarations of one spouse pertaining to the pedigree of the family of the other spouse are, however, admissible.

The relationship of the parties must be established *prima facie* by evidence *aliunde* the declaration.⁸

§ 7. Two branches of same family.—When the question in issue is whether two persons are

4. Whitlock v. Baker, *supra*.

5. Cases cited in note 3.

6. Shrewsbury Peerage Case, 7 H. L. Cas. 23; Buttrick v. Tilton, *supra*; People v. Fulton Ins. Co., *supra*; Davies v. Lowndes, 7 Scott N. R. 188.

7. Blackburn v. Crawfords, 3 Wall. (U. S.) 157, 187, 18 L. Ed. 186.

8. Blackburn v. Crawfords, *supra*.

related to each other, one of whom is a member of one branch of a family, it is sufficient to prove that the other party is a member of a different branch of that family.⁹

§ 8. **Proof of illegitimacy.**—When a lawful relationship is not claimed, hearsay testimony is inadmissible, as a rule, to establish an unlawful relationship *per se*. But when a relationship is acknowledged, and its legality only is disputed, hearsay from members of the family is admissible to prove either the legality or illegality of such relationship.¹⁰

Some courts hold, however, that where a statute creates the relation of ancestor and heir between an unmarried woman and her illegitimate child, declarations by the former are admissible to prove the unlawful relationship *per se*.¹¹ At common law, however, a declaration by a man that his deceased brother had an illegitimate son is not admissible.¹² Nor is a declaration by an illegitimate son that his natural brother died without issue.¹³ A declaration by a husband that his wife's parents were not married is admissible.¹⁴ Although an illegitimate child, at

9. *Monkton v. Atty. Gen., supra* (This is the only case cited by the claimants' counsel in the celebrated case of *Blackburn v. Crawfords, supra*.).

10. *Flora v. Anderson*, 75 Fed. Rep. 217.

11. *Northrop v. Hale*, 76 Me. 306.

12. *Crispin v. Doglioni*, 3 Swab. & Tr. 44.

13. *Doe v. Barton*, 2 Moody & Rob. 28.

common law, is a *nullius filius*, a declaration by his mother that he is illegitimate is admissible.

§ 9. **Declarant deceased.**—To render a declaration relating to pedigree admissible the declarant must be dead. The courts generally do not recognize any equivalent condition. A few courts, however, have violated this rule.¹⁵ Family reputation is admissible, however, although one or more members are still living. But when it relates to recent occurrences, and members of the family may be summoned as witnesses, family reputation is usually excluded.¹⁶

§ 10. **Declaration made ante litem motam.**—The declaration must be made before the beginning of any controversy or suit relating to the subject of the declaration.¹⁷ This condition is not essential, however, if the sole purpose of the declaration was to prevent litigation.

The mere fact that the declarant was ignorant that a controversy had arisen does not render the declaration inadmissible.¹⁸

14. *Jewel v. Jewel*, 1 How. (U. S.) 219; *People v. Fulton Ins. Co.*, 25 Wend. (N. Y.) 205.

15. *Campbell v. Wilson*, 23 Tex. 252.

16. *Harland v. Eastman*, 107 Ill. 538; *Butler v. Mountgarret*, 7 H. L. Cas. 633.

17. *Berkeley Peerage Case*, 4 Camp. 417; *Northrop v. Hale*, *supra*; *Stein v. Bowman*, 13 Pet. (U. S.) 209, 220, 10 L. Ed. 129; *Elliot v. Piersol*, 1 Peters (U. S.) 328; *Hodges v. Hodges*, 106 N. C. 374; *Nehring v. McMurriam*, 94 Tex. 45, 57 S. W. R. 943; *Northrop v. Hale*, *supra*.

18. *Berkeley Peerage Case*, *supra*.

§ 11. **Declaration based upon hearsay.**—It is not essential that the declaration be based upon personal knowledge of the declarant. It may be based upon hearsay. It is essential, however, that the person from whom he gets his information is qualified to speak. When this condition is met hearsay may be based upon hearsay.¹⁹

§ 12. **Declaration made as to age.**—A person's knowledge as to his own age is based upon hearsay. He may, however, testify upon this point.²⁰ Again, his knowledge as to the age of a relative may be based upon hearsay. In such case declarations made by him on this point are admissible, provided the requisite conditions are met.

§ 13. **Declarations as to particular facts.**—As to matters of pedigree the declaration may relate to particular facts, such as time of birth, place of birth, etc. It is essential, however, that the particular fact be material to the question of pedigree involved in the case.²¹

19. Berkeley Peerage Case, *supra*.

20. Com. v. Phillips, 162 Mass. 504, 39 N. E. R. 109; State v. Cain, 9 W. Va. 559, 569; Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. R. 541. In People v. Colbath, 141 Mich. 189, 104 N. W. R. 633, it was held that testimony of an orphan as to her age was inadmissible where it appeared that she had obtained knowledge of her age from a person outside her family.

21. Com. Life Ins. Co. v. Schwenk, 94 U. S. 593; Van Sickle v. Gibson, 40 Mich. 170; Mason v. Fuller, 45 Vt. 29; Wise v. Wynn, 59 Miss. 588, 42 Am. Rep. 381; Town of Londonderry v. Town of Andover, 28 Vt. 416, 427; Adams v. Inhab. of Swansea, 116 Mass. 591.

§ 14. **Question of pedigree in issue.**—According to the English rule it is essential to the admissibility of this class of testimony that a question of pedigree be a main fact in issue.²² This rule obtains in the federal courts and in some of the state courts.²³ Upon principle, however, it is unsound. The trustworthiness of the declaration should depend upon the conditions and circumstances that existed when the declaration was made and not at all upon the nature of the litigation in which it is offered as evidence. Many of the state courts have repudiated the English rule.²⁴ Bigelow, C. J., commenting on the rule says: "Some of the authorities seem to limit the competency of this species of proof to cases where the main subject of inquiry relates to pedigree, and where the incidents of birth, marriage and death, and the times when these events happened, are directly in issue. But, upon principle, we can see no reason for such limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation."²⁵

22. *Haynes v. Guthrie*, 13 Q. B. D. 818; *Berkeley Peerage Case*, *supra*.

23. *Conn. Life Ins. Co. v. Schwenk*, *supra*; *Crispin v. Doglioni*, 3 Swab. and Tr. 44.

24. *Mason v. Fuller*, *supra*; *Wise v. Wynn*, *supra*; *Van Sickie v. Gibson*, *supra*; *Dupont v. Davis*, 30 Wis. 170,

25. *North Brookfield v. Warren*, 16 Gray (Mass.) 171.

§ 15. **Facts of infancy, insanity and death.**—

When *infancy* or *insanity* is the fact in issue no question of pedigree is involved. Hence, according to the English rule, declarations pertaining to either of them are inadmissible.²⁶ When the question in *issue* is *death* some courts hold that a question of pedigree is involved, while other courts hold the contrary.²⁷

§ 16. **Pedigree of animals.**—This exception to the rule against hearsay has been applied in cases where the pedigree of animals was involved. Thus, in an action for the value of a jackass which was negligently killed by the defendant the court held that common repute as to his pedigree, among those who knew him, was admissible.²⁸ And in an action to recover the value of a dog the court admitted testimony of his reputed pedigree. In this case the court said: "The question of pedigree and ancestry is a matter of common or general reputation, whether the question concerns horses, cattle, dogs or men. The matter, from the very nature of things, depends upon reputa-

26. *Haynes v. Guthrie*, *supra* (infancy); *Conn. Life Ins. Co. v. Schwenk*, *supra* (infancy); *People v. Koerner*, 154 N. Y. 355, 370 (insanity); *Houlton v. Manteuffel*, *supra* (infancy.)

27. *Du Pont v. Davis*, 30 Wis. 170 (In this case a plea of non-joinder of parties was sought to be met by introducing general repute in the family that the other joint tenant was killed in an explosion.)

28. *Jones v. Packet Co.*, Miss. 31 So. R. 201.

tion or common repute. It is shown that certain books are kept, and in them there is a registration of pedigree, kept up for the information of the public, not only as to horses, but also as to cattle and dogs. These are shown to be received as satisfactory evidence of pedigree in the same manner and upon the same idea as entries in family records of births, deaths and marriages are received with regard to the human family (citing cases). It is true that in family records the entries in the books are usually made by the relatives and friends of the person, but inasmuch as dogs have no relatives competent to make entries for them, it is allowable for such entries to be made by the owners, friends and admirers of the dog."²⁹

§ 17. Written declarations, entries and inscriptions.—Written declarations, entries and inscriptions pertaining to matters of pedigree are admissible. No formality is essential. The entries may be made in an almanac;³⁰ or in the family bible.³¹ They may consist of recitals in wills;³² deeds;³³ marriage certificates or mar-

29. *Citizens' Co. v. Dew*, 100 Tenn. 317.

30. *Herbert v. Tuckal*, T. Raym. 84.

31. *Weaver v. Leiman*, 52 Md. 708. See instructive note 111 Am. St. Rep. 586-588.

32. *Shuman v. Shuman*, 27 Pa. St. 90; *Gaines v. New Orleans*, 6 Wall. (U. S.) 642; *Summerhill v. Darrow*, 94 Tex. 71, 57 S. W. R. 942; *Pearson v. Pearson*, 46 Cal. 609.

33. *Fulkerson v. Homes*, *supra*.

riage settlements;³⁴ parish records of baptism,³⁵ etc. They may also consist of inscriptions on monuments;³⁶ tombstones;³⁷ family portraits;³⁸ coffin plates; rings³⁹ and other family memorials.

§ 18. **Weight of declarations relating to pedigree.**—As a general rule this class of testimony should be received with caution. Ordinarily it is weak evidence. The family pride of the declarant may have induced him to make biased statements. He may have possessed imperfect knowledge of the facts of his family history. The witness who testifies to the declarations may be prejudiced. Moreover, his fear of prosecution for perjury is comparatively slight.

34. Doe v. Davis, 10 Q. B. D. 314.

35. Harman v. Stearns, 95 Va. 58, 27 S. E. R. 601.

36. Camoys Peerage Case, 6 Clark & F. 801.

37. Moncton v. Atty Gen., *supra*; Buttrick v. Tilton, 155 Mass. 461.

38. Camoys Peerage Case, *supra*.

39. Vowels v. Young, 13 Ves. 144.

CHAPTER IX.

Declarations Relating to Matters of Public and General Rights.

§ 1. **In general.**—This class of hearsay testimony has had a much wider application in England than in the United States. Hence the English cases on the subject are much more numerous than the American.

§ 2. **Meaning of term.**—As used in this connection matters of public or general interest are those in which the people generally have a *pecuniary* interest which effects their legal rights and liabilities. They do not include matters which merely tend to gratify curiosity or love of amusement or information.

Public rights are those in which all the people of the state are interested; whereas general rights are those in which only the people of a community or district are interested.

§ 3. **Basis of admissibility.**—The basis of admissibility of this class of testimony is tersely stated by Lord Campbell, C. J., as follows: "The admissibility of declarations of deceased persons in such cases is sanctioned because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence, therefore, ought not to be required; because in local matters, in which the community are interested, all persons living in the neighborhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many

parties unconnected with each other, who are all interested in investigating the subject.”¹

§ 4. **Requisites of admissibility.**—The requisites of admissibility of this class of declarations are as follows: the declaration must express community reputation as distinguished from individual opinion; it must be made *ante litem motam* (before the beginning of any controversy or dispute between the parties in regard to the matter); the declarant must have had opportunity to acquire information in regard to the matter involved; the declarant must be deceased; the matter involved must be, according to the English rule, of a public or general nature.

§ 5. **Community reputation essential.**—The declaration, to be admissible within this exception, must relate to community reputation. The mere allegation of a fact of which the declarant had personal knowledge is inadmissible. As said by Denman, L. C. J., in rejecting testimony that a certain person, now deceased, had planted a tree to indicate the location of a public boundary: “He does not assert that he has heard old people say what was the public road; but he plants a tree and asserts that the boundary of the road is at that point. It is the mere allegation of a fact by an individual. . . . That is, he knew it to be so from what he himself observed, and not from reputation.”²

1. Reg. v. Inhab. of Bedfordshire, 4 El. & Bl. 535.

2. Regina v. Bliss, 7 Adol. & E. 550.

§ 6. **Subject-matter of the community reputation.**—This class of declarations has been held admissible where the question in issue related to the boundary line of a town, county, parish, hamlet, manor, public highway, etc.;³ to a right of common based upon immemorial custom;⁴ to a local custom in regard to mining;⁵ to the location of a section line,⁶ or of a line between two commons;⁷ to a right to operate a ferry;⁸ to a prescriptive liability to repair a bridge, and to a right to collect tolls on a public road.¹⁰

On the other hand, this class of declarations has been held inadmissible where the question in issue related to the right of the tenants of a particular manor to cut and sell timber;¹¹ to the duty of a sheriff of a certain county to execute criminals convicted of capital offenses;¹² to prescriptive rights of common by certain tenants of a manor;¹³ to the boundaries of a waste in which

3. *Brisco v. Lomax*, 8 Adol. & Ell. 198; *Nichols v. Parker*, 14 East, 331; *Plaxton v. Dare*, 10 Barn. & Cres. 17; *Drury v. Midland Ry. Co.* 127 Mass. 571.

4. *Weeks v. Sparke*, 1 Maule & S. 679.

5. *Crease v. Barrett*, 1 Crompton, M. & R. 919.

6. *Mullaney v. Duffey*, 145 Ill. 559. See also *Klinkner v. Schmidt*, 114 Ia. 695, 87 N. W. R. 661 (boundary of street).

7. *Morris v. Callanan*, 105 Mass. 129.

8. *Pim v. Currell*, 6 Mess. & W. 234.

9. *R. Sutton*, 8 Adol. & Ell. 516.

10. *Brett v. Beales*, Moody & M. 416.

11. *Blackett v. Lowes*, 2 Maule & S. 494.

12. *R. v. Antrobus*, 2 Adol. & Ell. 793.

13. *Dunraven v. Llewellyn*, 15 Q. B. D. 791.

rights of common were claimed;¹⁴ to the boundary line between two private estates,¹⁵ and to matters generally that are of distinctly private concern or in which private interests predominate.¹⁶

§ 7. **Private boundaries.**—As regards the admissibility of unsworn statements respecting private boundaries and their landmarks there is much conflict in the decisions. In England such statements are inadmissible except where the private boundary is coincident with a public boundary.¹⁷ In this country the rule is much more liberal. In the great majority of the states reputation evidence is admissible respecting private boundaries and their landmarks.¹⁸ In a few states, however, the courts follow the English rule.¹⁹

§ 8. **Reasons for liberal view in the United States.**—One reason assigned for the liberal view that obtains in this country as regards the

14. *Dunraven v. Llewellyn*, *supra*.

15. *Drinkwater v. Porter*, 7 Car. & P. 181; *Clothier v. Chapman*, 14 East, 331.

16. *Blackett v. Lowes*, 2 M. & S. 494, 15 Rev. Rep. 324; *Wells v. Jesus College*, 7 C. & P. 284, 32 E. C. L. 615.

17. Cases cited in note 15.

18. *Morton v. Folger*, 15 Cal. 275; *Hunnicut v. Peyton*, 102 U. S. 333; *Clement v. Parker*, 125 U. S. 309; *Taylor v. Fornby*, 116 Ala. 621, 22 So. 910; *Mullaney v. Duffey*, *supra*; *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. R. 154. See notes, 15 Am. Dec. 628-631; 36 Am. Rep. 749; 60 Am. Rep. 589-591; 94 Am. St. Rep. 673-683.

19. *Hall v. Mayo*, 97 Mass. 416; *Boston Water Power Co. v. Hanlon*, 132 Mass. 483.

admissibility of reputation testimony respecting private boundaries is the different system of survey which prevails here.²⁰ Another reason is necessity. As said by Baltzell, C. J., "Reputation or hearsay, taken in connection with other evidence, is entitled to respect in cases of boundary when the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the primitive landmarks or other evidence than that of hearsay."²¹

§ 9. Particular facts provable by reputation evidence.—Reputation evidence is not admissible to prove specific acts of enjoyment, but it is admissible to prove the main facts in issue, such as the location of a boundary line.

Formerly, specific acts of enjoyment within living memory had to be shown before reputation evidence was admissible to prove the fact in issue; but this rule is now obsolete.

Declarations of a particular fact respecting a *private* boundary have been held inadmissible unless they were made by *persons who*, it is shown, *had knowledge* of that whereof they spoke, and who were on the land or in possession of it when the declarations were made. And furthermore, that "they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties re-

20. *Morton v. Folger*, *supra*.

21. *Dagget v. Willey*, 6 Fla. 511. See also *Clark v. Hills*, 67 Tex. 152.

lating thereto.”²² Many courts, however, apply a more liberal rule in regard to the admissibility of this class of testimony with respect to private boundaries.²³

Reputation evidence is not admissible to prove possession or acts of ownership.²⁴ Nor is it admissible to prove a contract or matter of record.²⁵

§ 10. **Declarations made by a surveyor.**—Declarations made by a surveyor while engaged in locating a boundary, which limit, characterize or explain his acts, constitute a verbal part of the *res gestae* and are admissible as original evidence.²⁶ And memoranda made by him under these circumstances are admissible.²⁷ But declarations made by him based merely on the acts of other persons are inadmissible.²⁸ Moreover, to be admissible under other circumstances they must be traditional.²⁹

§ 11. **Maps and charts.**—Public maps and charts, when sufficiently authenticated, are held admissible. They are not admissible, however,

22. *Hunnicut v. Peyton*, 102 U. S. 363, 364.

23. *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. R. 782; *Lemon Harstock*, 80 Mo. 13; *Causeland v. Fleming*, 63 Pa. St. 36; *Clement v. Packer*, 125 U. S. 309.

24. *Hiers v. Risher*, 54 S. C. 405, 32 S. E. R. 509.

25. *McCoy v. Galloway*, 3 Ohio 282, 17 Am. Dec. 591.

26. *Hunnicut v. Peyton*, *supra*.

27. *Ayers v. Watson*, 137 U. S. 584. See also note 94 Am. St. Rep. 682.

28. *Russell v. Hunnicut*, 70 Tex. 657.

29. *Shutte v. Thompson*, 15 Wall, 151.

to prove private matters, or such as would likely be inaccurately stated in such documents.³⁰ When they are not ancient their contents must be shown to be correct.³¹

Maps and charts, when sufficiently authenticated, are usually held admissible in this country to prove private boundaries;³² but in Massachusetts they have been rejected.³³

30. Steph. Ev., art. 35.

31. *Marble v. McMinn*, 57 Barb. (N. Y.) 610.

32. *Taylor v. McConigle*, 120 Cal. 123, 52 Pac. R. 159; *Coate v. Spear*, 3 McCord (S. C.) 227, 15 Am. Dec. 627 and note.

33. *Boston Water Co. v. Hanlon*, *supra*.

CHAPTER X.

Public Records and Public Documents.

§ 1. **In general.**—Public records and public documents made by public officials in the discharge of their official duties, and which are intended for public inspection, are legally relevant. Confidential reports, however, are inadmissible.¹

§ 2. **Scope of this exception.**—The records and documents embraced in this class of unsworn statements include judicial records, legislative

1. *Sturla et al. v. Freccia et al.*, 5 H. L. Cas. 623. See also *Oaks v. United States*, 174 U. S. 778 (In this case the governmental reports were not confidential and were held admissible).

journals; state papers, municipal records, official certificates, etc.

§ 3. **Judicial records.**—Public records of judicial proceedings are legally relevant to prove their contents.

§ 4. **Legislative journals.**—The journals of congress and of the state legislature are legally relevant to prove all facts relating to public matters recited in them.²

§ 5. **State papers.**—These include official documents and books authorized by congress or a state legislature and also official messages and proclamations by the chief executive. Such documents and books are legally relevant.³

§ 6. **Municipal records.**—These include charters, ordinances, etc. When properly authenticated they are legally relevant.⁴

§ 7. **Certificates by public officials.**—These are inadmissible at common law, but in many states they are made admissible by statute.⁵ In no case, however, are they admissible to prove collateral facts.⁶

§ 8. **Church records of births, marriages and deaths.**—According to the English rule church

2. *Watkins v. Holman*, 16 Pet. (U. S.) 25, 56; *Grob v. Cushman*, 45 Ill. 119; *Mills v. Stevens*, 3 Pa. St. 22.

3. *Rex v. Sutton*, 4 M. & S. 532; *Bryan v. Forsyth*, 19 How. (U. S.) 334; *Gregg v. Forsyth*, 24 How. (U. S.) 179.

4. *Lindsay v. Chicago*, 115 Ill. 120; *Holly v. Bennett*, 46 Minn. 386.

5. *Lindsay v. Chicago*, *supra*; *United States v. Benner*, 1 Baldw. (U. S.) 234.

6. *Daggett v. Bonewitz*, 107 Ind. 276.

registers are inadmissible unless required by law to be kept. This rule also obtains in some states;⁷ but according to the general rule, however, which obtains in this country, it is not essential that they be required by law to be kept. It is sufficient if they are made by a person in the discharge of his public official duties.⁸

§ 9. Governmental gazettes. Newspapers.—Governmental gazettes, being official organs, are legally relevant to prove recitals of public acts. Newspapers, however, are usually not admissible.⁹ An exception to this rule is where they are offered to prove notice, publication, etc. But even where this is the purpose they are excluded in some cases.¹⁰ Another exception is quotations of current prices.

§ 10. Unofficial books.—Unofficial books on literature, science and art are generally inadmissible.¹¹ In some states, however, books of science are, within certain limits, made legally relevant by statute.¹²

§ 11. Accredited historical books.—To a limited extent historical books are legally relevant. As said by Barrows, J.: "General histories of painstaking authors long since deceased, and of

7. *Kennedy v. Doyle*, 10 Allen (Mass.) 161.

8. *Evanston v. Gunn*, 99 U. S. 660; *Huston v. Council Bluffs*, 101 Ia. 33; *People v. Dow*, 64 Mich. 714.

9. *Downs v. N. Y. Cent. Ry. Co.*, 47 N. Y. 83.

10. *Whittier v. Alb. & Nar. Ins. Co.*, 109 Mass. 24.

11. *Morris v. Harner*, 7 Pet. (U. S.) 554.

12. *Gould v. Schermer*, 101 Ia. 582.

established reputation, . . . are competent evidence upon a question of this nature. No one claims them as conclusive or infallible, but carefully used as aids and guides and accepted as true where their statements are uniform and consistent with the evidence of original records and admitted or well known facts, they will be found of great service in arriving at a satisfactory conclusion."¹³

§ 12. **Medical books.**—Medical books constitute, in a large measure, the *theories* of medical men. For this reason they are not legally relevant.¹⁴

13. *State v. Wagner*, 61 Me. 178. See also *Reynolds' Steph. on Evid.* (3d ed.) art. 35; *Morris v. Harmer*, 32 U. S. 553 (In this case Dr. Drake's "Picture of Cincinnati" was held admissible. The author was living and in court.).
14. *Yoe v. The People*, 49 Ill. 410.

CHAPTER XI.

Ancient Documents.

§ 1. **Meaning of the term.**—An ancient document, as used in the law of evidence, is one which is at least thirty years old.¹

§ 2. **The ancient rule.**—Originally the document had to be more than thirty years old.

1. *Whitman v. Henneberry*, 73 Ill. 109; *Jackson v. Blanshau*, 3 Johns, (N. Y.) 298 (In this case Kent, C. J., says: "The rule requiring thirty years as the test of an ancient deed is an old and well-settled rule of evidence.").

Spencer, J., says: "The ancient rule required the lapse of sixty years before a deed proved itself; this rule has been narrowed to thirty years."² In some early cases the limit fixed was forty years.³

§ 3. **Essentials of admissibility.**—A document which is at least thirty years old, is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity sufficient to free it from all just suspicion, is presumed to be genuine and is admissible without further proof.⁴

§ 4. **Reason for the rule.**—The chief reason for this rule is necessity. As said in a celebrated English case: "The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence."⁵

§ 5. **Meaning of proper custody.**—The term, "proper custody," as used in this connection, is given a somewhat liberal interpretation. It is not essential that the document be found in the *most appropriate custody*. It is sufficient if the actual custody is so reasonably, and probably accounted for that it impresses the mind with

2. Jackson v. Blanshau, *supra*.

3. Benson v. Olive, Bunb 284 (1730).

4. Applegate v. Lexington Mining Co., 117 U. S. 255, 262; Pettingell v. Boynton, 139 Mass. 244; Greenfield v. Camden, 74 Me. 56.

5. Malcomson v. O'Dea, 10 H. L. Cas. 593.

the conviction that the instrument found in such custody must be genuine.⁶ As said by Mr. Wood, "Documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, or in the possession of persons having an interest in them, are in precisely the custody which gives authenticity to documents found within it."⁷ The custodian should state under oath such facts as he may possess that would tend to enlighten the court as to the genuineness of the document.⁸

§ 6. **Acts of enjoyment.**—It is not essential to show acts of enjoyment under the document. Nor is it essential to show that the custodian is directly interested in the title;¹⁰ or that he is in possession of it.¹¹

§ 7. **Suspicious circumstances.**—This class of testimony is inherently weak and received with caution. If there are suspicious circumstances connected with the document they must be satisfactorily explained. Ordinarily the antiquity of the document is sufficient to raise a presumption

6. *Meath v. Winchester*, 3 Bing. (N. C.) 201, 10 Bligh 462.
See also *Harris v. Hoskins*, 2 Tex. Civ. App. 486.

7. Wood, *Pract. Evid.*, sec. 99.

8. *Earl v. Lewis*, 4 Esp. 1.

9. *City of Boston v. Richardson*, 105 Mass. 357; *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365; *Applegate v. Lexington Mining Co.*, *supra*; *Malcomson v. O'Dea*, *supra*.

10. *Goodwin v. Jack*, 62 Me. 414.

11. *Harlan v. Howard*, 79 Ky. 373; *Applegate v. Lexington Mining Co.*, *supra*.

of its genuineness. Erasures, interlineations, or other suspicious circumstances may, however, rebut this presumption. In such case, as said by Mr. Starkie, "it is a matter of prudence and discretion to prove it in the usual way by means of an attesting witness where living, or by proof of the handwriting of an attesting witness where they are all dead, in order to rebut the unfavorable presumption arising from an inspection of the deed."¹² It has been held, however, that where an erasure and substitution do not increase the obligee's interest, or the obligor's obligation, they do not affect either the admissibility or validity of the document.¹³ This rule is a sensible one and in harmony with the modern view. According to the early rule an immaterial alteration in a document rendered the instrument void.¹⁴

§ 8. Possession under the document.—Proof of possession under the deed, even for a short time, is sufficient to establish the authenticity of the document.¹⁵ Proof of possession, however, is not essential. Testimony of other facts which raise a fair presumption of the genuineness of the document is sufficient.¹⁶ As said by Mr. Wood, "The

12. 1 Stark. Evid., § 344.

13. *Coulson v. Walton*, 9 Pet. (U. S.) 62.

14. *Pigot's Case*, 11 Coke Rep. 27.

15. *Hamlin v. Burwell*, 75 Va. 551 (In this case there was proof of possession for five years and it was held sufficient.).

16. *White v. Hutchins*, 40 Ala. 53; *Whitman v. Henneberry*, 73 Ill. 109.

absence of proof of possession affects merely the weight and not the admissibility of the instrument; and ancient documents purporting to be a part of the transaction to which they relate, and not a mere narrative of them, are receivable as evidence that these transactions actually occurred. Where proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances."¹⁷

§ 9. Mode of estimating the age of the document.—As previously stated, the document must be at least thirty years old. As a general rule, in computing the age of a document, time is reckoned from the date of the instrument to the date it is offered in evidence. This rule obtains in England and quite generally in this country.¹⁸ In a few states, however, including New York and Pennsylvania, the courts have applied a different rule in the case of *wills* where possession is based wholly upon the document. In this class of cases these courts have held that time is to be computed from the death of the testator.¹⁹

§ 10. Scope of the rule.—The rule that ancient documents prove themselves is not confined to

17. Wood, Pract. Evid., sec. 99.

18. Reuter v. Stuckart, 181 Ill. 529; Bass v. Sevier, 58 Tex. 557; Man v. Ricketts, 7 Beav. 93; Doe v. Wolley, 8 B. & C. 22 (In this case Lord Tenderden says: "The rule of computing thirty years from the date of a deed is equally applicable to a will.).

19. Staring v. Bowen, 6 Barb. (N. Y.) 109; Shaller v. Brand, 6 Binn. (Pa.) 439.

deeds and wills. It is also applicable to many other kinds of documents, including parish registers, entries in family bibles, bonds, leases, chartularies of abbeys, pay rolls, certificates, powers of attorney, licenses, etc:

CHAPTER XII.

Declarations Against Interest by Persons Since Deceased.

§ 1. **In general.**—Admissions and declarations against interest by persons since deceased constitute separate and distinct classes of hearsay testimony. The former are admissible only against the parties who make them, or persons who are in privity with them. The latter, on the other hand, are admissible in suits between persons who were strangers to the declarants.

§ 2. **The rule.**—Declarations which are against the pecuniary or proprietary interest of the declarant, made without any probable motive to falsify, and under circumstances which raise the presumption that he had knowledge of the adverse interest when he made them, are admissible, after his death, even in a suit between parties who were strangers to him. Mr. Stevens says that “a declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to mis-

represent it, and it was opposed to his pecuniary or proprietary interest.”¹

§ 3. **The adverse interest.**—As stated in § 2, the interest involved in the declaration must be of a pecuniary or proprietary nature. It may consist of an acknowledgement by the declarant that he is indebted to another;² that an account he had against another person has been paid;³ that he misappropriated money belonging to another person;⁴ that a certain chattel in his possession belongs to another person;⁵ that he holds certain property in trust;⁶ that he pays rent for the realty he occupies, rebutting the presumption that he owns it,⁷ etc.

§ 4. **The interest partly self-serving.**—It sometimes happens that the interest involved in the declaration is partly against the declarant's in-

1. Steph. Dig. Evid. art. 28.

2. Bartlett v. Patton, 33 W. Va. 71, 10 S. E. R. 21, 5 L. R. A. 523; Story v. Story, 22 Ky. L. Rep. 1731, 61 S. W. R. 279.

3. Higham v. Ridgeway, 10 East 109, 10 Rev. Rep. 235; Davies v. Humphreys, 6 M. & W. 153; Scammon v. Scammon, 33 N. H. 52; Keesling v. Powell, 149 Ind. 372, 49 N. E. R. 265.

4. Mahaska County v. Ingalls, 16 Ia. 81.

5. Riggs v. Powell, 142 Ill. 453, 32 N. E. R. 482; Dean v. Wilkerson, 126 Ind. 338, 26 N. E. R. 55.

6. Houser v. Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; Lamar v. Pearre, 90 Ga. 377, 17 S. E. R. 92.

7. Currier v. Gale, 14 Gray (Mass.) 504, 77 Am. Dec. 343; Crain v. Wright, 46 Ill. 107; Chandler v. Evans, 8 Blackf. (Ind.) 322.

terest and partly in his favor. In such cases the part which is self-serving should be eliminated, provided this can be done without destroying the sense of what remains.⁸ If this cannot be done, and the part of the declaration which is against the interest of the declarant does not represent a greater interest than the self-serving part represents, the whole declaration is inadmissible.⁹ This principle is applicable where the receipt of money on a debt revives a liability barred by the statute of limitations;¹⁰ or creates directly a foundation for receiving a larger amount.¹¹ It has been held, however, that where the declaration is *prima facie* against the pecuniary or proprietary interest of the declarant it is admissible even when in reality it is, on the whole, beneficial to him.¹² Thus, in a celebrated English case, where the issue was whether the receipt of £2000 by the defendant's wife from her father, now deceased, was a gift or a loan, entries made in the father's private account book, acknowledging the receipt at different times of

8. *Chamberlain v. Chamberlain*, 116 Ill. 480, 6 N. E. R. 444.

9. *Grant v. Size*, 22 U. C. Q. B. D. 473, 2 Grant Err. & App. (U. C.) 368; *Coffin v. Buckman*, 12 Me. 471; *Beatty v. Clement*, 12 La. Ann. 82; *Addams v. Seitzinger*, 1 Watts & S. (Pa.) 243; *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. R. 165.

10. *Glynn v. Bank of England*, 2 Ves. 38.

11. *Haines v. Christie*, 28 Colo. 502, 66 Pac. R. 883.

12. *Taylor v. Witham*, 3 Ch. D. 605, 45 L. J. Ch. 798; *Turner v. Crisp*, 2 Ld. Raymond 1320.

£20 interest in connection with the transaction, were held admissible.¹³

§ 5. Declarations favorable to wife and unfavorable to creditors.—Where the declarations of a husband are against his own pecuniary or proprietary interest, and the purpose of them is to favor his wife at the expense of his creditors, they are inadmissible.¹⁴

§ 6. Declarations by a beneficiary under a will.—Under this exception to the rule against hearsay a declaration by a beneficiary under a will may be admissible. Thus, where the issue was the mental capacity of the testator to make a will, in which there was but one beneficiary, a declaration by the latter, made on the day the will was made, that the testator “is just alive and that is all,” has been held admissible.¹⁵ It is to be observed, however, that had there been other beneficiaries, in the case stated, the declaration would have been inadmissible.

§ 7. The adverse interest contingent.—The adverse interest must be actual as distinguished from contingent.¹⁶ It must be real or apparent when the declaration is made.¹⁷ Thus, a declaration made by a prospective heir is inadmissible.¹⁸

13. *Taylor v. Witham*, *supra*.

14. *Dmitry v. Pollock*, 12 La. 296.

15. *Egbers v. Egbers*, 177 Ill. 82.

16. *Tate v. Tate*, 75 Va. 552; *Smith v. Blakey*, L. R. 2 Q. B. D. 326, 8 B. & S. 157.

17. *Thaxter v. Inglis*, 121 Cal. 593, 54 Pac. R. 86; *Wilson v. Simpson*, 68 Tex. 306, 4 S. W. R. 839.

18. *Morton v. Massie*, 3 Mo. 482.

§ 8. **The adverse interest not pecuniary or proprietary.**—When the adverse interest is not pecuniary or proprietary the declaration is inadmissible. Thus a declaration which purports criminal liability¹⁹ on the part of the declarant, or liability *ex contractu*²⁰ or *ex delicto*,²¹ is inadmissible.

§ 9. **Declaration by a partner.**—A declaration by a person, since deceased, that a given other person was, or was not, his partner may, or may not, be admissible, depending upon the circumstances of the particular case. Thus, in an action against A and B as partners, A died during the pendency of the action, and the plaintiff continued it against B, who denied that he was a partner. The business was insolvent. To prove his plea B offered in evidence a declaration by A

19. *Davis v. Com.* 95 Ky. 19, 23 S. W. R. 585, 15 Ky. L. Rep. 396, 44 Am. St. Rep. 201; *West v. State*, 76 Ala. 98; *State v. West*, 45 La. Ann. 14, 12 So. R. 7; *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (In this case a clergyman, in keeping secret a marriage ceremony which he had performed, made himself criminally liable to a fine; and a declaration by him to his son that he had performed the ceremony was held inadmissible.).
20. *Smith v. Blakey*, L. R. 2 Q. B. D. 326, 8 B. & S. 157, 36 L. J. Q. B. 156; *Perchard v. Benyon*, 1 Cox Ch. 214, 29 Eng. Reprint 1134. *Contra*, *Halvorsen v. Moon, etc., Lumber Co.*, 87 Minn. 18, 19 N. W. R. 28, 94 Am. St. Rep. 669.
21. *Ayer v. Colgrove*, 81 Hun (N. Y.) 322, 30 N. Y. Suppl. 788 (seduction); *Penner v. Cooper*, 4 Munf. (Va.) 458 (trespass).

that B was not his partner. As the business was insolvent the declaration was held admissible. In view of the insolvency, A's declaration was against his pecuniary interest. As said by the court, "The assertion, therefore, that Humes (B) was not a partner, having been made at a time when the partnership business had failed, it was a declaration exonerating him from a pecuniary liability for the partnership debts, and, if true, to this extent doubled the ultimate amount of Glover's (A's) liability."²² It may be well to observe that had the business been *solvent*, and had A's declaration been that B was his partner the declaration would likewise have been admissible. The declaration in such case would have been against A's pecuniary interest because it would have been an acknowledgement by him that B had an interest in the partnership assets. Again, where a person, since deceased, held in his own name certain property, a declaration by him that a partnership existed was held admissible in an action by the surviving partner to recover the property.²³

§ 10. Declaration by a guardian or adopted parent.—Where the issue is whether a given infant was the ward or adopted child of a person, since deceased, a declaration by the latter that the infant was merely his ward is inadmissible. This is because his declaration was in his favor

22. Humes v. O'Bryan, 74 Ala. 64.

23. Card v. Moore, 173 N. Y. 598, 66 N. E. R. 1105.

rather than against his interest.²⁴ On the other hand, a declaration by him that the infant was his adopted child would be admissible because it would be against his interest, in that, if true, it would show legal pecuniary obligations.²⁵

§ 11. Declaration by a policy holder.—In an action on an insurance policy it was held that a declaration by the assured, since deceased, that his lungs were weak was inadmissible because it did not affect in any way his pecuniary interests.²⁶ But had weak lungs on his part reduced his pecuniary interest in the policy, or increased his premiums or assessments, the declaration would have been admissible.

§ 12. Statement that the declarant is a negro.—In applying this exception to the rule against hearsay some courts have been very loose. Thus, in an Alabama case, a declaration by a person, since deceased, that he was a negro was held admissible.²⁷ This seems a clear violation of the spirit of the exception and an extension of it which was not at all justifiable.

24. *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. R. 35.

25. *White v. Holman*, 25 Tex. Civ. App. 152, 60 S. W. R. 437.

26. *Ry. Officials' and Employees' Acc. Assoc. v. Coady*, 80 Ill. App. 563.

27. *Locklayer v. Locklayer*, 139 Ala. 354, 35 So. R. 1008. For a strict application of the exception see *West. Md. Ry. Co. v. Mauro*, 32 Md. 280 (In this case a declaration by an official that he had been paid five dollars on a subscription to stock was inadmissible—that it was not against his pecuniary interest.).

§ 13. **Death of the declarant a prerequisite.**—According to the English rule the declarant must be dead.²⁸ The fact that he is *in extremis* is not sufficient.²⁹ In this country the English rule is generally followed;³⁰ but in a few states a more liberal rule has been recognized.³¹

§ 14. **Collateral facts may be proved.**—This class of declarations is admissible to prove not only the main facts embodied in them but also collateral facts fairly included.³² Thus, in a written receipt for money paid the writing may be introduced to prove the date;³³ the nature of the claim;³⁴ the party who made the payment;³⁵ special circumstances connected with the transaction,³⁶ etc.

28. *Spargo v. Brown*, 9 Barn. & C. 935; *Phillips v. Cole*, 10 Adol. & Ell. 106.
29. *Harrison v. Blades*, 3 Camp. 458.
30. *Currier v. Gale*, 14 Gray (Mass.) 504, 77 Am. Dec. 343; *Rand v. Dodge*, 17 N. H. 343.
31. *Griffith v. Sauls*, 77 Tex. 630; *Harriman v. Brown*, 8 Leigh (Va.) 697. In an exceedingly important Iowa case, *Dillon, J.*, says: "We need only say, that probably the courts would not be inclined to relax this rule so as to dispense with this condition (death of the declarant), unless it might be in the case of confirmed insanity." See case in foot-note 4.
32. *Taylor v. Gould*, 57 Pa. St. 152; *Hart v. Kendall*, 82 Ala. 144, 3 So. R. 41.
33. *Taylor v. Gould*, *supra*.
34. *Higham v. Ridgway*, *supra*.
35. *Thompson v. Stevens*, 2 Nott & M. (S. C.) 493.
36. *Higham v. Ridgway*, *supra*.

§ 15. Declarations made post litem motam.—

In the case of declarations relating to pedigree and those relating to public and general interest it is essential that the unsworn statements be made *ante litem motam*. But in the case of declarations against interest by parties since deceased this feature is not essential. The true test, as stated in a Minnesota case, is "whether they were made under circumstances justifying the conclusion that there was no probable motive to falsify the facts declared. The existence or nonexistence of a controversy at the time a declaration was made might be a material circumstance to enable the court to determine whether there was any probable motive for the declarant to falsify as to the facts declared. Whether the fact that the declaration was made after a controversy arose would tend to show such motive would depend upon the character and facts of each particular case."³⁷

§ 16. Form of the declaration.—According to the English rule the declaration may be oral as well as in writing.³⁸ This rule obtains in Canada³⁹ and very generally in the United States.⁴⁰ In Massachusetts, however, the courts have held

37. *Halvorsen v. Moon & Kerr Lumber Co.*, 87 Minn. 18.

38. *Doe v. Pettett*, 5 B. & Ald. 223, 7 E. C. L. 129; *Sussex Peerage Case*, *supra*, *Barker v. Rag*, 2 Russ. 3 Eng. Ch. 63.

39. *Grant v. Size*, *supra*.

40. *White v. Chouteau*, 10 Barb. (N. Y.) 202; *Trego v. Huzzard*, 19 Pa. St. 441, 35 Pa. St. 9; *Humes v. O'Bryan*, 74 Ala. 64; *Hosford v. Rowe*, 41 Minn. 245, 42 N. W. R. 1018; *Bowen v. Chase*, 98 U. S. 254, 25 L. ed. 47.

that oral declarations are inadmissible where the adverse interest is a *pecuniary* as distinguished from a proprietary one.⁴¹ In the important Iowa case cited in foot-note 4, Dillon, J., says: "From the unbroken current of English and the decided preponderance of American authority, we think the present state of the law is, that verbal declarations are receivable." An exception to this rule is where the substantive law makes a written instrument essential to effect a particular legal result. In this case an oral declaration against interest is inadmissible. Thus, a declaration by a party since deceased that he had sold certain lands to a claimant is inadmissible to establish the claim, where no deed is offered or accounted for.⁴²

§ 17. Prerequisite of personal knowledge of the declarant.—Upon this point the authorities are in conflict. Some courts hold that the declarant must have personal knowledge of the facts stated in his declaration.⁴³ Other courts hold that the declaration may be based upon hearsay.⁴⁴ According to the English rule the declarant must be a person "having a competent knowledge, or whose duty it was to know;"⁴⁵ "having peculiar

41. *Jones v. Howard*, 3 Allen (Mass.) 223; *Framingham Manuf. Co. v. Barnard*, 2 Pick. (Mass.) 532.

42. 16 Cyc. foot-note 62; *Marsh v. Ne-ha-sa-ne Park Assoc.*, 18 Misc. (N. Y.) 314, 42 N. Y. Suppl. 996.

43. *Arbuckle v. Templeton*, 65 Vt. 205; *Bird v. Hueston*, 10 Ohio St. 428.

44. *Crease v. Barrett*, 1 Cr. M. & R. 919.

45. *Short v. Lee*, 2 Jac. & W. 464, 489.

means of knowledge;"⁴⁶ having "a competency to know it."⁴⁷ While Dr. Greenleaf says "it does not seem necessary that the fact should have been stated on the personal knowledge of the declarant."⁴⁸

46. *Gleadow v. Atkins*, 1 Cr. & M. 410.

47. *Doe v. Robson*, 15 East 32.

48. 1 Greenl. Evid. (16th ed.) § 153.

CHAPTER XIII.

Account-Book Entries.

§ 1. **In general.**—Owing to the fact that some courts fail to discriminate properly between account-book entries and entries made in the regular course of business in the books of strangers to the suit considerable confusion exists in the decisions. While these two classes of testimony are closely allied in principle, and probably are traceable to a common origin, they are not synonymous. The rule of evidence relating to the former had its origin nearly a century before the rule relating to the latter. Moreover, the historical development of each has been different. Testimony of entries made in the regular course of business is admissible in a suit between strangers; while testimony of account-book entries is not. Moreover, the requisites of admissibility of the two classes of testimony are not identical. Both rules, however, came into existence before

the rule against hearsay, and therefore neither, in the strict sense, is an exception to that rule; and, for a similar reason, several of the other so-called exceptions to the rule against hearsay are in reality independent rules.

§ 2. **Historical development of the rule in England.**—At the English common law parties to the litigation were incompetent witnesses. They were allowed, however, even in early times, to introduce in evidence their books of account. This was a violation of the strict rules of evidence. It allowed parties to the litigation to introduce their own testimony—"make evidence for themselves." The basis of the rule was necessity, either real or presumed. Lord Chancellor Hardwicke says, "A tradesman's books are admitted as evidence through no absolute necessity, but the reason of a presumption of necessity only, inferred from the nature of commerce."¹ This view harmonizes with the fact that since parties to the litigation were made competent witnesses by statute account-book entries have been admitted in evidence the same as before.

In England the scope of the rule relating to the admissibility of account-book entries has been considerably restricted, both by parliament and by the courts. In 1609 a statute was passed which provided, among other things, that this class of testimony be excluded "in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except

he . . . shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor . . . some action for the said debt, wares or work done, within one year next after the same wares delivered, money due for wares delivered, or work done.”² This statute, while ignored by the lower courts, was recognized and applied by the superior courts for more than two hundred years; and seems never to have been repealed. Finally these courts looked with disfavor upon the rule which admitted account-book entries of parties to the litigation, and restricted this class of testimony to account-book entries made by clerks.³ This is the modern English rule.⁴

§ 3. Historical development of the rule in the United States.—In the United States the development of the rule relating to account-book entries has been different from that which has obtained in England. The early colonial courts ignored the one-year provision of the English act of 1609, and the courts generally have always admitted account-book entries made by the parties to the litigation, as well as those made by their clerks. As said in a Pennsylvania case, “though in England the shop book of a tradesman is not evidence of a debt without the assist-

1. *Omychund v. Barker*, 1 Atk. 21, 49.

2. 7 Jac. I. ch. 12.

3. *Cooper v. Marsden*, 1 Esp. 1.

4. *Taylor*, Evid. (9th ed.) §§ 709-713.

ant oath of the clerk who made the entry, yet here, from the necessity of the case, as business is often carried on by the principal, and many of our tradesmen do not keep clerks, the book proved by the plaintiff himself has always been admitted."⁵ The courts hold, however, that the entries must be verified under oath. In most of the states, at least, statutes govern the admissibility of this class of testimony, and while these statutes are not entirely harmonious the general principles of the common law underlie them.

§ 4. **Scope of the rule.**—Generally, the rule is restricted to proof of account-book entries of goods sold and work or labor done. In some jurisdictions, however, it has been extended to account-book entries of professional services rendered by attorneys, physicians, etc.⁸

§ 5. **Inadmissible to prove collateral facts.**—Account-book entries are not admissible to prove collateral facts. Thus, they are not admissible to prove merely the rate of wages agreed to be paid, or the length of the service;⁹ or that credit was given to a person other than the one to

5. *Poultney v. Ross*, 1 Dall. (Pa.) 238, 1 Law ed. 117.
6. *Field v. Thompson*, 119 Mass. 151; *Ball v. Gates*, 12 Metc. (Mass.) 491.
7. *Mattingly v. Shortell*, 27 Ky. Law Rep. 426, 85 S. W. R. 215.
8. *Richardson v. Dorman*, 28 Ala. 679; *Hall v. Ard*, 48 Pa. St. 22; *Ganahl v. Shore*, 24 Ga. 17.
9. *Silver v. Worcester*, 72 Me. 322, 330.
10. *Cooley v. Collins*, 186 Mass. 507, 71 N. E. R. 979; *Kaiser v. Alexander*, 144 Mass. 71, 78, 12 N. E. R. 209.

whom the goods were sold and delivered;¹⁰ or a promise of payment;¹¹ or that the sale was made conditional;¹² or that the sale was made on commission;¹³ or that on certain days the plaintiff did not work for the defendant;¹⁴ or a promise to answer for the debt of another;¹⁵ or that credit was given solely to a certain third party.¹⁶

§ 6. **The entries must be original.**—It is essential that the entries be original. Subsequently posted entries are inadmissible. Thus, where the entries are made in a day book or journal and subsequently posted in a ledger the ledger is inadmissible.¹⁷ The form of the book, however, is immaterial, provided it is a book of original entry. Thus, it may be a book kept in the form of a ledger if this is the usual mode the party uses in keeping his accounts.¹⁸ The entries may be made temporarily on a slate,¹⁹ pieces of paper,²⁰ pieces of board,²¹ etc., and within a reason-

11. *Somers v. Wright*, 114 Mass. 171.

12. *Rogers v. Severson*, 2 Gill (Md.) 385.

13. *Richards v. Burrows*, 62 Mich. 117.

14. *Morse v. Potter*, 4 Mass. 292.

15. *Tarrand v. Gage*, 3 Vt. 326.

16. *Peck v. Kellar*, 76 N. Y. 604.

17. *Fitzgerald v. McCarty*, 55 Ia. 702, 8 N. W. R. 646; *Griesheimer v. Tanenbaum*, 124 N. Y. 650, 26 N. E. R. 957.

18. *Faxon v. Hollis*, 13 Mass. 427; *Wells v. Hatch*, 43 N. H. 246.

19. *Faxon v. Hollis*, *supra*; *Landis v. Turner*, 14 Cal. 573; *Moses v. United States*, 166 U. S. 571.

20. *Taylor v. Davis*, 82 Wis. 455; *Robinson v. Mulder*, 81 Mich. 75.

able time transcribed in the book of original entry. But entries that are merely copied from temporary memoranda made by another person are inadmissible. Thus, where the bookkeeper merely copies the entries from memoranda contained in time books or time slips kept by the laborers the entries are not admissible.²² Some courts hold that personal knowledge of the fact stated in the entry is essential. Thus, in a Michigan case, it is held that a merchant's books of account are inadmissible in an action for goods sold and delivered, where the only testimony to support them is that of the bookkeeper who merely transcribed the entries from slips handed him by the salesmen, and who had no personal knowledge of the sale and delivery of the articles charged. This case also holds that personal knowledge of the party who makes the entry has been held essential "from the earliest cases."²³ Other courts, on the other hand, hold the contrary view. Thus, in an Illinois case, where the entries were made from time-slips, which were marked "approved" by the foreman, who testified to their correctness, and where the parties who transcribed the entries to the account books testified that the entries were correctly copied

21. *Smith v. Sandford*, 12 Pick. (Mass.) 139, 22 Am. Dec. 415; *Paine v. Sherwood*, 21 Minn. 225; *Pallman v. Smith*, 135 Pa. St. 188; *West v. Van Tuyl*, 119 N. Y. 623.

22. *Swan v. Thurman*, 112 Mich. 416; *Schnellbacher v. Plumb Co.*, 108 Ill. App. 486.

23. *Swan v. Thurman*, *supra*.

from the time-slips, the entries were held admissible.²⁴ The latter view seems a very sensible one and should be followed. The same principle applies where sales clerks in a store report sales to the bookkeeper who enters them in the account book. If the transactions are properly verified it does not seem necessary that the bookkeeper have *personal* knowledge of the sales. But in such case both the salesmen and the bookkeeper should testify to the correctness of the entries.²⁵ The entries may be made in pencil as well as in ink.²⁶ In the case of services performed they are admissible to prove work done by an apprentice as well as that done by the master.²⁷

§ 7. Entries must be reasonably contemporaneous with the transactions.—It is also essential that the entries be made within a reasonable time after the transactions occur.²⁸ In other words, they must be made in the due course of business. Each case, however, depends upon its own particular circumstances. As said by Bigelow, J., "Although the rule is well settled that the entries, to be competent, must have been made at or near the time the charges were incurred, it does not fix any precise time within which they must be made. There is no inflexible

24. *Chisholm v. Beaman Machine Co.* 160 Ill. 101.

25. *Smith v. Sanford*, 12 Pick. (Mass.) 139, 22 Am. Dec. 415.

26. *Gibson v. Bailey*, 13 Metc. (Mass.) 537.

27. *Mathes v. Robinson*, 8 Metc. (Mass.) 269, 41 Am. Dec. 505.

28. *Bentley v. Ward*, 116 Mass. 333; *Griesheimer v. Tanenbaum*, 124 N. Y. 650.

rule requiring them to be made on the same day. In this particular every case must be made to depend very much upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries."²⁹ If the entries constitute merely a recital of past transactions, rather than an account of transactions made in the due course of business, they are inadmissible.³⁰

§ 8. Inadmissible in a suit between strangers.

—According to the English rule, and also the general rule in this country, this class of testimony is not admissible in a suit between strangers. The books of account must belong to a party to the suit, or a party who is in privity with him.³¹ This rule, however, has not always been strictly enforced.³²

§ 9. Amount involved limited.—As a general rule, the amount involved in the entries must be comparatively small. This is especially true in the case of cash entries.³³ The maximum amount in regard to such entries is usually \$10. The limitation fixed by the English courts is 40 shillings.

29. *Barker v. Haskell*, 9 Cush. (Mass.) 218.

30. *Henshaw v. Davis*, 5 Cush. (Mass.) 145.

31. *Somers v. Wright*, *supra*; *Field v. Thompson*, 119 Mass. 151.

32. *Coleman v. Ins. Association*, 77 Minn. 31, 79 N. W. R. 588.

33. *Silver v. Worcester*, *supra*; *Kelton v. Hill*, 58 Me. 114; *Davis v. Sanford*, 9 Allen (Mass.) 216; *Rich v. Eldridge*, 42 N. H. 153, 158; *Pettit v. Teal*, 57 Ga. 145.

In some states the amount is fixed by statute.³⁴ In the case of goods sold on credit, or services performed, the rule is more liberal. It has been held, however, that a charge of \$300 for "seven gold American watches" is too large an amount to be proved by this class of testimony.³⁵

§ 10. **Verification of the entries.**—To render account-book entries admissible they must be authenticated or verified, either by oral testimony of the party who made them, or in case of his death by proving his handwriting.³⁶ In the case of entries made by partners each should verify his own entries.³⁷ And where a wife makes them in the capacity of agent of her husband both spouses should testify in regard to them.³⁸ When the party who makes the entries has no personal knowledge of the facts recorded his testimony must be supplemented by that of the party who has such knowledge.³⁹ This rule is correct upon principle and is quite generally enforced. A few courts, however, have applied a more liberal rule.⁴⁰

34. *Alexander v. Smoot*, 35 N. C. 461.

35. *Bustin v. Rodgers*, 11 Cush. (Mass.) 216.

36. *McDonald v. Carnes*, 90 Ala. 147; *Watrous v. Cunningham*, 71 Cal. 30; *Hoover v. Gehr*, 62 Pa. St. 136.

37. *Horton v. Muller*, 84 Ala. 537.

38. *Smith v. Smith*, 163 N. Y. 168, 57 N. E. R. 300.

39. *Smith v. Smith*, *supra*; *Taylor v. Davis*, 82 Wis. 455, 52 N. W. R. 756; *Hart v. Kendall*, 82 Ala. 144.

40. *Diament v. Colloty*, 66 N. J. L. 295, 49 Atl. R. 445; *Anchor Milling Co. v. Walsh*, 108 Mo. 284, 18 S. W. R. 904, 32 Am. St. Rep. 300.

§ 11. **Rule where more satisfactory testimony is obtainable.**—As previously stated, the basis of admissibility of account-book entries is necessity. As said in a New York case, “such is the general course of business that no proof could be furnished of the frequent small transactions between men without resorting to the entries which they themselves have made in this form of accounts.”⁴¹ Where more satisfactory testimony is obtainable some courts reject this class of testimony.⁴² Many courts, however, hold the contrary view. These courts, however, usually require that the entries be properly authenticated. Some require proof that some of the articles charged have been delivered; and furthermore that the party keeps fair and honest accounts.⁴³ Some reject this class of testimony where the party keeps a clerk.⁴⁴ In many states, however, the admissibility of this class of testimony is regulated by statutes, and these statutes generally provide that when account-book entries are authenticated as provided in the statutes they shall constitute *prima facie* evidence of the facts stated in them.

41. *Larne v. Rowland*, 7 Barb. (N. Y.) 107. See also *Pratt v. White*, 132 Mass. 477; *Weamer v. Juart*, 29 Pa. St. 257, 72 Am. Dec. 627.

42. *Bracken v. Dillon*, 64 Ga. 243, 37 Am. Rep. 70; *Eastman v. Moulton*, 3 N. H. 156.

43. *Smith v. Smith*, *supra*; *Vosburg v. Thayer*, 12 Johns (N. Y.) 461.

44. *Smith v. Smith*, *supra*; *Jackson v. Evans*, 8 Mich. 476.

§ 12. Alterations, erasures, mutilations, etc.—

Where account-book entries have alterations, erasures, etc., which give them a fraudulent appearance they should not be admitted unless they are explained to the satisfaction of the court.⁴⁵ In the case of mutilations it depends upon the circumstances of the particular case. It has been held that mutilation of a book of original entry by the party who has custody of it is such a suspicious circumstance that it cannot be supported by introducing the ledger.⁴⁶ On the other hand it has been held that the mere fact of mutilation affects the weight rather than the admissibility of the book.⁴⁷ Mr. Wharton says, "The book on its face must be regular. Mutilated memoranda cannot constitute a book of original entries."⁴⁸

§ 13. Book with only one entry.—A book which contains only a single entry, although designated an account book, is inadmissible. "It has never been held that a single entry makes an account-book, nor has it ever been held that a single entry of cash in a book is competent proof."⁴⁹

45. *Davis v. Sandford*, 9 Allen (Mass.) 216; *Lovelock v. Gregg* 14 Colo. 53; *Richardson v. Emery*, 23 N. H. 220; *Wilson v. Wilson*, 6 N. J. L. 114; *Harrold v. Smith*, 107 Ga. 849, 33 S. E. R. 640.

46. *Deimel v. Brown*, 35 Ill. App. 303, 136 Ill. 586.

47. *Weigle v. Brantigan*, 74 Ill. App. 285.

48. 1 Whart., Evid., § 684.

49. *Kibbe v. Bancroft*, 77 Ill. 18.

§ 14. **Entries in a separate book.**—To be admissible in evidence entries of accounts must be made in the regular course of business in books kept for that purpose. “A book which shows on its face that it was not one of entries in the regular course of business, but was a separate book containing no charges except against the defendant is not admissible as a book of original entries. The regularity of the account as to its place in the ordinary books of the business is as necessary as its regularity in other respects, and the book, failing in that requirement must be rejected.”⁵⁰

§ 15. **When ledger also admissible.**—Where the entries in the first instance are made in the day-book and subsequently posted in the ledger, and the book of original entry is introduced in evidence, the ledger is also admissible, provided the party who made the entries testifies that those contained in the ledger are correct transcripts of those contained in the day-book. Moreover, it is prejudicial error for the trial court to reject the ledger.⁵¹ And where the entries are, in the first instance, made in the ledger it is then a book of original entry and, of course, the entries are admissible. Furthermore, where the day-book contains check-marks indicating that the entries have been transcribed in the ledger the latter must be produced for the benefit of the adverse

50. *In re Fulton's Estate*, 178 Pa. St. 78; *Corning v. Ashley*, 4 Denio (N. Y.) 354.

51. *Stickle v. Otto*, 86 Ill. 161.

party.⁵² And where the day-book has been destroyed accidentally the entries contained therein may be proved by introducing the ledger.⁵³

§ 16. **Entries usable to refresh memory.**—Whether the entries are admissible in evidence or not they may be used to refresh the memory of the witness. Moreover, the fact that the testimony is thus supported tends to give it more weight.⁵⁴

CHAPTER XIV.

Entries Made in the Regular Course of Business by Strangers to the Parties to the Suit.

§ 1. **In general.**—As stated in the chapter next preceding, entries of this class are separate and distinct from account-book entries. As regards the latter the party who made the entries is usually alive and in court; but in the case of the former entries he is not. Moreover, entries of the former class are admissible when made by strangers to the parties to the suit, while in the case of account-book entries they are not.

§ 2. **Basis of admissibility.**—The chief basis of admissibility of this class of hearsay testi-

52. *Prince v. Swett*, 2 Mass. 569.

53. *Chatanga, Ore. & I. Co. v. Blake*, 144 U. S. 476; *Stillwater v. Fairwell*, 64 Vt. 286; *McCrary v. Jones*, 36 S. C. 136.

54. *Robinson v. Smith*, 111 Mo. 205.

mony is necessity. As said by Justice Story, "It is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination under oath, and the question then arises whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts where ordinary prudence cannot guard us against the effects of human mortality."¹ Another ground of admissibility is the trustworthiness of this class of testimony. As said by Parker, C. J., "What a man has said when not under oath may not, in general, be given in evidence when he is dead. . . . But what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury."²

§ 3. Must be made soon after transaction.—The entries must be made *in the due course of business*. If they constitute a mere recital of a past transaction they are inadmissible. On the other hand, the fact that temporary memoranda are made at the time of the transaction and subsequently transcribed in a book of record will not render the latter inadmissible, provided the memoranda are transcribed within a reasonable time.³

1. Nicholls v. Webb, 8 Wheat. (U. S.) 326.

2. Welsh v. Barrett, 15 Mass. 380.

3. C. & A. Ry. Co. v. Strawboard Co., 190 Ill. 268 (In this

§ 4. Not essential that entry be made in the performance of a duty required by law.—According to some of the English decisions the entry must be made in the performance of a duty required by law.⁴ According to others it seems to be sufficient if made in the performance of a duty either to the public or to a private employer. As said by Lord Denman, “the entry must be against the interest of the party who writes it, or made in the discharge of some duty for which he is responsible.”⁵ In this country the rule seems to be more liberal. It is not essential that the entry be made in the performance of a duty required by law.⁶ It is usually sufficient if made in the regular course of busi-

case the plaintiff was allowed to introduce in evidence eighteen “stack sheets” containing entries transcribed from scale tickets each of which stated the weight of a load of straw.).

4. *Chambers v. Bernasconi et al.*, 1 C. & J. 451 (In this case a sheriff had stated in his return the *place* where the arrest was made. As this was no part of his duty the entry was held inadmissible.)
5. *Reg. v. Inhab. of Worth*, 4 Adol. & E. 132. See also *Massey v. Allen*, L. R. 13 Ch. Dw. 558, 562 (In this case entries by a broker were rejected because not made in the course of a duty.).
6. *Kennedy v. Doyle*, 10 Allen (Mass.) 161 (In this case an entry relating to a baptism by a Roman Catholic priest was held inadmissible). See also, *Inhab. of Augusta v. Inhab. of Windsor*, 19 Me. 317; *Evanston v. Gunn*, 99 U. S. 660 (In this case records kept by a person in the employ of the United States signal service were held admissible.).

ness, irrespective of any special duty in regard to it.

§ 5. Requisite of death of party who made the entry.—According to the English rule, to render this class of testimony admissible the party who made the entry must be dead.⁷ This rule has been recognized in this country. As said in a Pennsylvania case, "It has recently been settled that the memorandums, made at the time, by a person in the ordinary course of business, of acts and matters which his duty in such business required him to do for others, are admissible evidence of the acts and matters so done after death. But if he is living he must be called."⁸ The modern American rule, however, is more liberal. Even in some of the early decisions the courts recognized insanity,¹⁰ and the fact that the party had absconded," as sufficient.

§ 6. Personal knowledge of party who makes the entry.—According to some decisions one of the requisites of admissibility of this class of testimony is personal knowledge of the party

7. *Price v. Torrington*, 1 Salk. 285; *Polini v. Gray*, 12 Ch. Div. 411, 429, 430; *Sturla v. Freccia*, 5 App. Cas. 623.
8. *Farmers' Bank of Lancaster v. Whitehill*, 16 Serg. & R. (Pa.) 89.
9. *Mayor, etc., of New York v. Ry. Co.*, 102 N. Y. 572, 7 N. E. R. 905, 55 Am. Rep. 839; *Perkins v. Ins. Co.*, 10 Gray (Mass.) 323, 71 Am. Dec. 654; *Shove v. Wiley*, 18 Pick. (Mass.) 558. See also note to *Price v. Torrington* in *Smith's Lead. Cas.* 572.
10. *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

who makes the entry. Thus, Justice Fields says, "that rule, with some exceptions, not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony if living and accessible."¹²

♦

§ 7. Oral statements not within the exception.

—According to the English rule this class of testimony includes oral statements. Thus, in the celebrated *Sussex Peerage Case*, Lord Campbell says, "By the law of England the declarations of deceased persons are generally not admissible unless they are against the pecuniary interest of the party making them. There are two exceptions: First, where a declaration, by word of mouth or by writing, is made in the course of business of the individual making it, there it may be received in evidence, though it is not against his interest."¹³ But according to a modern English case¹⁴ there seems to be a tendency to narrow the scope of this rule. In this

11. *North Bank v. Abbott*, 13 Pick. (Mass.) 466, 25 Am. Dec. 334.

12. *Chaffee v. United States*, 18 Wall. (U. S.) 540, 541.

13. 11 Clark & F. 85.

14. *Dawson v. Dawson*, 22 T. L. R. 52. See also 19 Harvard Law Review for comment on this case.

country this class of testimony is confined to statements in writing.¹⁵

15. *Manning v. Sch. Dist.*, 124 Wis. 84, 102 N. W. R. 356; *Equit. Mfg. Co. v. Howard*, 140 Ala. 252, 37 So. R. 106.

CHAPTER XV.

Declarations Relating to the Physical or Mental Condition of the Declarant or to His Intention.

§1. **In general.**—Spontaneous exclamations of pain which instinctively accompany it and descriptive statements of pain are separate and distinct classes of testimony. The former are circumstantial original evidence, while the latter are hearsay. This important distinction, while recognized by all the authorities,¹ is frequently overlooked.

§ 2. **Spontaneous exclamations always admissible.**—When material to the issue spontaneous exclamations are always admissible. As said by Mitchell, J., "Exclamations and expressions of the latter kind are the natural language of pain; and whenever its existence at any particular time is a relevant fact such manifestations of it are always admissible as original evidence under the ordinary application of the rule of *res gestae*. They are in the nature of verbal acts, and may

1. *Roche v. Ry. Co.*, 105 N. Y. 294, 11 N. E. R. 630; *Williams v. Gt. North. Ry. Co.*, 68 Minn. 55.

always be testified to and described by any person in whose presence they were uttered.”² And as said by Dr. Greenleaf, “Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they are the natural language of the affections, whether of the body or the mind, they furnish satisfactory evidence, and often the only proof of its existence; and whether they were real or feigned is for the jury to determine.”³

§ 3. Descriptive statements by the injured party.—As to the admissibility of descriptive statements by the injured party the decisions are not harmonious. This exception to the rule against hearsay was reluctantly adopted and generally it has been applied with caution. Some courts hold that the descriptive statements to be admissible must be made to the medical attendant;⁴ while others hold the contrary.⁵ Mitchell, J., says that the former view is supported by the great weight of modern authority.⁶ The tendency seems to restrict rather than to enlarge the

2. Williams v. Gt. North. Ry. Co., *supra*.

3. Greenl., Evid. § 102.

4. Williams v. Gt. North. Ry. Co., *supra*; Lake St. Elevated Ry. Co. v. Shaw, 203 Ill. 39; West Chicago St. Ry. Co. v. Kennelly, 170 Ill. 508; Kellar v. Gilman, 93 Wis. 9.

5. Brown v. Mt. Holly, 69 Vt. 364; State v. Fournier, 68 Vt. 262; Atch. Ry. Co. v. Johns, 36 Kan. 769; St. Louis Co. v. Burrows, 62 Kan. 89, 61 Pac. R. 439.

6. Williams v. Gt. North. Ry. Co., *supra*.

scope of admissibility of this class of testimony. The modern cases on this subject go back to the English case of *Aveson v. Kinnaird et al.* in which a very liberal rule was applied.

§ 4. **Basis of admissibility of descriptive statements relating to pain.**—The basis of admissibility of this class of testimony is necessity. Upon this point Swayne, J., says, "These expressions are the natural reflexes of what it might be impossible to show by other testimony."⁸ Campbell, J., says, "It would be impossible in most cases to know the existence, extent, or character of pain without them."⁹ And Denis, J., says, "I think such evidence is admissible from the necessity of the case."¹⁰

§ 5. ***Aveson v. Kinnaird et al.***—In this case an action was brought on an insurance policy on the life of Mrs. Aveson. Statements made by her, while lying in bed at 11 o'clock a. m., that she was very poorly; that she had been to Manchester the Tuesday before; that her husband had been insuring her life; that she was not well when she went, etc., were held admissible.¹¹

§ 6. **Statements must be contemporaneous with the pain.**—As a general rule the statements

7. 6 East 188.

8. *Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397.

9. *Grand Rapids & I. Ry. Co. v. Huntley*, 38 Mich. 543.

10. *Caldwell v. Murphy*, 11 N. Y. 419. See also, *Elmer v. Fessenden*, 151 Mass. 359; *Lush v. McDaniel*, 13 Ired. (N. C.) 487; *Sugden v. Lord St. Leonards*, L. R. P. D. 154.

11. 6 East 188.

must be contemporaneous with the pain. Statements that are a mere narrative of past conditions are too untrustworthy to be admissible.¹² It has been held, however, that where the statements are made to the attending physician they may relate to past conditions as well as present. Thus, Endicott, J., says, "While a witness not an expert can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both past and present."¹³

§ 7. **Expert opinion admissible.**—While recitals of past suffering, whether made to the attending physician or to some other person, are generally inadmissible, expert opinion testimony based upon them is admissible. Moreover, the expert opinion may be partly based upon statements made by the injured party relating to past suffering.¹⁴ Some courts, however, seem to doubt the correctness of this view.¹⁵

12. *Lush v. McDaniel*, *supra*; *Bacon v. Charlton*, 7 Cush. (Mass.) 581; *Keley v. Detroit Ry. Co.*, 80 Mich. 237, 20 Am. St. Rep. 514; *Roach v. West. & A. Ry. Co.*, 93 Ga. 785.
13. *Roosa v. Boston Loan Co.*, 132 Mass. 439.
14. *Salem v. Webster*, 192 Ill. 369, 61 N. E. R. 323; *Omberg v. Ins. Co.*, 101 Ky. 303, 40 S. W. R. 909, 72 Am. St. Rep. 413; *Broyles v. Priscock*, 97 Ga. 643, 25 S. E. R. 389; *Chapin v. Marlborough*, 9 Gray (Mass.) 244.
15. *Lush v. McDaniel*, *supra*; *Abbott v. Heath*, 84 Wis. 314; *Rogers v. Crain*, 30 Tex. 284; *Poncha v. Crawford*, 18 Neb. 551.

§ 8. **Testimony of cause of injury inadmissible.**—Declarations made after the injury, and which relate to the cause of it, are inadmissible. As said by Lawrence, J., “to permit a party to prove what he himself stated to his physician, not in regard to the character and manifestations of his malady, but in reference to its specific cause, when that is one of the issues before the jury, would be carrying an acknowledged departure from the ordinary rules of evidence, having its origin in necessity, to a most dangerous extent.”¹⁶ Thus, it was held prejudicial error to admit a statement, made by the plaintiff to his attending physician, that he had been struck by a horse.¹⁷ But declarations made contemporaneously with the injury, and which relate to the cause of it, are admissible. In such case they constitute part of the *res gestae* and are original evidence.¹⁸ This class of testimony is frequently spoken of as *verbal acts*.

§ 9. **Declarations by attending physician to patient inadmissible.**—Statements by the attending physician to his patient, as to the nature of the injuries, are inadmissible.¹⁹ And statements

16. Ill. Cent. Ry. Co. v. Sutton, 42 Ill. 438. See also, Morrisey v. Ingham, 111 Mass. 63; Smith v. State, 53 Ala. 486; State v. Gedicke, 43 N. J. L. 86; Fordyce v. McCauts, 51 Ark. 509, 14 Am. St. Rep. 69.

17. Chapin v. Marlborough, *supra*.

18. Del., L. & W. Ry. Co. v. Ashley, 67 Fed. R. 209.

19. Alabama Ry. Co. v. Arnold, 81 Ala. 600; Armstrong v. Ackley, 71 Ia. 76.

by the attending physician to another physician, as to the nature of the injuries, not made in the presence of the injured person, are also inadmissible.²⁰

§ 10. **Some important discriminations.**—The admissibility of declarations relating to the physical or mental condition of the declarant may depend upon either the time, relatively speaking, at which the declarations are made, or the purpose for which they are offered. Thus, statements of presently existing sensations of pain, or of the location or seat of it, are admissible; whereas statements of past conditions, offered to prove the truth of the statements, are inadmissible. But if the purpose of the latter statements is merely to constitute the basis of expert opinion testimony they are admissible in the discretion of the court. And, as previously stated, if the exclamations are spontaneous utterances of present pain they are circumstantial original evidence and admissible as such to prove both the existence of the pain and the location of it.

§ 11. **Declarations indicating intention, motive or state of mind.**—When a person's intention, motive or state of mind is material to the fact in issue, statements made by him contemporaneously with the existence of such intention, motive or state of mind are admissible.²¹ Some

20. *Poncha v. Crawford*, *supra*.

21. *Com. v. Trefethen*, 157 Mass. 185; *Banfield v. Parker*, 36 N. H. 353; *Roesner v. Darrah*, 65 Kan. 599, 70 Pac.

courts, however, hold that a declaration of intention, to be admissible, must accompany and characterize some act which is legally relevant to the litigation.²² This view, however, is erroneous. If the declaration is contemporaneous with the intention, and the latter is material to the fact in issue, the declaration is admissible, irrespective of the fact that it is made prior to the happening of the event to which it relates.²³ This principle is also applicable where feelings of affection, emotion, prejudice, malice, etc., are material to the fact in issue.²⁴ And it would seem that it should be applied to show either the affirmative or negative of these feelings; but some courts refuse to apply it to show the negative on the ground that it would "allow a party to make evidence for himself."²⁵ This class of

R. 597; *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. R. 1071; *Horner v. Yance*, 93 Wis. 352, 67 N. W. R. 720.

22. *Siebert v. People*, 143 Ill. 571, 585; *Chicago, etc. Ry. Co. v. Chancellor*, 165 Ill. 438; *State v. Wood*, 53 N. H. 484, 494; *Lake Shore Ry. Co. v. Herrick*, 49 Ohio St. 25.

23. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285; *Com. v. Trefethen*, *supra* (overruling *Com. v. Felch*, 132 Mass. 22).

24. *Com. v. Holmes*, 157 Mass. 233, 32 N. E. R. 6; *Willis v. Bernard*, 5 Car. & P. 342; *Gaines v. Relf*, 12 How. (U. S.) 472, 520, 534; *Bailey v. Bailey*, 94 Ia. 629, 63 N. W. R. 341; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. R. 784; *Driver v. Driver*, 153 Ind. 88, 52 N. E. R. 401; *Laurence v. Laurence*, *supra*.

25. *Newcomb v. State*, 37 Miss. 383, 398.

testimony is frequently used in actions for criminal conversation, divorce, etc.²⁶

§ 12. **Declarations relating to wills.**—The admissibility of declarations of a testator depends largely upon the purpose for which they are offered. While the decisions are not altogether harmonious, the following propositions are very generally supported by the authorities.

Where the fact in issue is the mental capacity of the testator to make a will declarations made by him either before, at the time of, or after executing the will, are admissible, provided those made before or after the execution of the will are not too remote.²⁷

These principles also apply where the fact in issue is whether the will was procured by undue influence or not.²⁸ This is owing to the fact that the mental strength of the testator is in issue in every case of alleged undue influence. As said by Seldon, J., "So the mental strength and condition of the testator is directly in issue in every case of alleged undue influence; and the same evidence is admissible in every such case, as in cases where insanity or absolute incompetency

26. *Ash v. Prunier*, 105 Fed. R. 722; *Lockwood v. Lockwood*, *supra*; *Wright v. Tatham*, 5 Cl. & F. 683; *Gilchrist v. Bale*, 8 Watts, 356; *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 340. See also, note, 44 Am. St. Rep. 848.

27. *Waterman v. Whitney*, 11 N. Y. 157; *Herster v. Herster*, 122 Pa. St. 239; *Lane v. Moore*, 151 Mass. 87; *Burns v. Mill*, 121 N. C. 336.

28. Cases cited in foot-note 27.

is alleged.”²⁹ Upon this point Mr. Jarman says, “The amount of undue influence which will be sufficient to invalidate a will must of course vary with the strength or weakness of the mind of the testator.”³⁰

Where the will is disputed on the ground of fraud, duress, or some similar cause other than mental weakness or undue influence of the testator, only declarations made contemporaneously with the execution of the will are admissible;³¹ except that where the testator’s mental condition is legally relevant, declarations made by him before and after the execution of the will are admissible to prove or disprove this issue.³² Upon this point Seldon, J., says, “where the . . . will is disputed on the ground of fraud, duress, mistake, or some similar cause, aside from the mental weakness of the testator, I think it equally clear that no declarations of the testator himself can be received in evidence except such as were made at the time of the execution of the will, and are strictly a part of the *res gestae*.”³³ And Professor Wigmore says, “The testator’s assertion that a person, named or unnamed, has procured him by *fraud* or *pressure* to execute a will or to insert a provision, is plainly obnoxious.

29. *Waterman v. Whitney*, *supra*.

30. 1 Jarman on Wills, 36.

31. *Waterman v. Whitney*, *supra*.

32. *Grant v. Thompson*, 4 Conn. 203; *Herster v. Herster*, *supra*.

33. *Waterman v. Whitney*, *supra*.

to the hearsay rule, if offered as evidence that the fact asserted did occur. . . . For this reason they (such declarations) are by most courts regarded as inadmissible But these utterances may be, nevertheless, availed of as evidence of the testator's *mental condition*, if the latter fact is relevant."³⁴

Where the fact in issue is whether a certain will has been revoked or not only those declarations that are contemporaneous with the alleged act of revocation are admissible.³⁵ Thus, where a will is found in a fireplace partly burnt, and the question is *quo animo* of the testator, only those declarations which form part of the *res gestae* are admissible.

Where the question in issue is whether certain alterations in a will were made before or after the execution of the will, declarations of intention made by the testator before the execution of the will, and which tend to show that the alterations were made prior to the execution of the will, are admissible.³⁶

Where the question in issue is the contents of a lost will, declarations by the testator made at the time of executing the will, and those made

34. Wigmore on Evidence, Vol. III, § 1738.

35. *Waterman v. Whitney*, *supra*; *Bibb v. Thomas*, 2 Wm. Blackstone 1044; *Dan v. Brown*, 4 Cowen (N. Y.) 483; *Doe v. Perkes et als.*, 3 Barn. & Ald. 489.

36. *Doe d. Shallcross v. Palmer*, 16 Q. B. D. 747; *Behrens*, 47 Ohio St. 323; *Sugden v. Lord St. Leonards*, 1 Prob. Div. 154.

before the execution of the will are admissible.³⁷ But those made *after* the execution of the will are not admissible; except that, where there is direct evidence of the contents of the lost will such post-testamentary declarations are admissible to *corroborate* the direct testimony.³⁸

§ 13. **Case of Throckmorton v. Holt.**—In the case of Throckmorton v. Holt³⁹ the supreme court of the United States hold that ante-testamentary declarations of a testator are not admissible to prove the contents of a lost will; that there is no good ground for distinguishing between ante-testamentary and post-testamentary declarations; and that these views accord with the weight of authority. In support of these views it cites only Stevens v. Vancleve, 4 Wash. C. C. 262. Three members of the court dissent. The majority opinion in the case is clearly erroneous on both points.

37. Sugden v. Lord St. Leonards, *supra*; Gardner v. Gardner, 177 Pa. St. 218; Gordon v. Burris, 141 Mo. 602; Wilton v. Humphreys, 176 Mass. 253.
38. Quick v. Quick, 3 Sw. & Tr. 442; Sugden v. Lord St. Leonards, *supra*; Woodward *et al.* v. Coulstone *et al.*, 11 H. of L. Cas. 469; Clark v. Turner, 50 Neb. 290; *in re* Page, 118 Ill. 576, 8 N. E. R. 852; *in re* Lambie's Estate, 97 Mich. 49, 56 N. W. R. 223; Clark v. Morton, 5 Rawle (Pa.) 235; Mercer's Administration v. Mackin, 14 Bush. (Ky.) 434; Lea v. Cooper Co., 21 How. (U. S.) 493.
39. 180 U. S. 552.

CHAPTER XVI.

Declarations Forming Part of, or Relating to,
the *Res Gestae*.

§ 1. **In general.**—The term *res gestae* means things done. In the law of evidence it had its origin in Horne Tooke's trial for high treason in 1794.¹ Originally, however, it was used in the singular form. But in the case of *Aveson v. Kinnaid*² it was freely used in the plural form. In the decisions of this country it was first used in Massachusetts in 1808.³

§ 2. **Vague use of the term.**—The vague use of the term "*res gestae*," in the law of evidence, has been frequently commented upon. Professor Thayer says, "We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity multiplied its capacity; it was a larger 'catch-all.' To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."⁴ Dean Wigmore says, "There has been such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth *res gestae* that it is perhaps impossible to disen-

1. 25 Howell's State Trials 440.

2. 6 East 188.

3. *Bartlett v. Delprat*, 4 Mass. 702.

4. *Amer. Law Rev.*, XV., 5, 81.

tangle the real basis of principle involved.”⁵ And Beasley, C. J., says, “I think I may safely say that there are few problems in the law of evidence more unsolved than what things are embraced in those occurrences that are designated in the law as the *res gestae*.”⁶

§ 3. **The general rule.**—Spontaneous utterances, made immediately upon the happening of some principal transaction materially relevant to the issue, which are influenced by it, and which limit, characterize or explain it, constitute declarations which form part of, or relate to, the *res gestae*, and are admissible in evidence. If, however, they constitute a mere narrative of a past occurrence they are inadmissible.

§ 4. **Verbal acts.**—Declarations which possess the attributes stated in § 3, and which are *strictly contemporaneous* with the principal transaction, form a *part* of the *res gestae* and are original evidence. Such declarations are verbal acts and the rule against hearsay does not apply to them. As said by Fletcher, J., “when the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence.”⁷

5. Wigmore on Evid., Vol. III., § 1745.

6. Hunter v. State, 40 N. J. L. 536.

7. Lund v. Tyngsborough, 9 Cush. (Mass.) 42.

§ 5. **Scope of verbal acts.**—Verbal acts constitute either a part of the issue, a part of an act which is material to the issue, or circumstantial evidence of an existing condition.

§ 6. **Action for slander or libel.**—In an action for slander or libel the alleged statement constitutes part of the issue and is original evidence. As said by Doster, C. J., "The rule is general that, where a substantive litigated fact is the speech of a person, one who heard the utterance is admitted to testify to it, and the testimony so received is not hearsay."⁸

§ 7. **Action for malicious prosecution.**—In an action for malicious prosecution, where the defendant sets up that in bringing the former action against the present plaintiff he did so based upon information received by him from some third person, the statements made to him by the third person in such case are original evidence and admissible as such. They are not offered for the purpose of proving the truth of the statements, but merely to show the information upon which the present defendant acted in bringing the former action against the present plaintiff. As said by Eastman, J., "It does not follow that, because the words in question are those of a third person, they are necessarily hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were spoken and not whether they are true."⁹

8. *State Bank v. Hutchinson*, 62 Kan. 9.

9. *State v. Wentworth*, 37 N. H. 217.

§ 8. **Excellent illustration of the principle in the Harry K. Thaw murder trial.**—In the celebrated Harry K. Thaw murder trial the defendant admitted killing Stanford White and set up insanity as a defense. His counsel offered in evidence certain letters written to him by his wife, Evelyn Thaw, and which contained statements of immoral conduct toward her by White. These letters were objected to by the prosecution on the ground that to admit them would constitute a violation of the rule against hearsay. The trial court correctly ruled, however, that the letters were admissible, since they were offered not to prove the truth of the statements contained in them but to show their inherent tendency to create a “brain storm” in the mind of the defendant.

§ 9. **Statements which accompany an act which is material to the principal fact in issue.**—Statements which accompany an equivocal act which is independently material to the issue, and which statements limit, characterize or explain it, are verbal acts and admissible as original evidence. As said by Clifford, J., “Declarations of a party to a transaction, though he was not under oath, if they were made at the time any act was done which is material as evidence in any issue before the court, and if they were made to explain the act, or to unfold its nature and quality, and were of a character to have that effect, are treated in the law of evidence, as verbal acts, and, as such, are not hearsay, but may be intro-

duced, with the principal act which they accompany and to which they relate, as original evidence, because they are regarded as a part of the principal act, and their introduction in evidence is deemed necessary to define that act and unfold its true nature and quality."¹⁰ Thus, where a person charged with the larceny of goods found in his possession makes statements which tend to characterize or explain such possession, his statements are verbal acts and admissible as original evidence.¹¹ And generally, statements by a person in possession of property, which characterize the nature of such possession, whether as owner or otherwise, are verbal acts and admissible as original evidence. This principle has been also applied to declarations by alleged bankrupts;¹² to declarations by a testator which characterize his act in destroying his will to show whether the act was intentional or accidental; to declarations which characterize the acts of a person involving the question of his domicile,¹³ and to declarations by a debtor which

10. *Ins. Co. v. Mosley*, 8 Wall. 411.

11. *Comfort v. People*, 54 Ill. 404.

12. *Rawson v. Haigh*, 9 J. B. Moore 217; *Robson et al. v. Kemp et al.*, 4 Esp. 233. *Bateman v. Bailey*, 5 T. R. 512; *Thomas v. Connell*, 4 M. & W. 267; *Smith v. Cramer*, 1 Bing. (N. C.) 585.

13. *Bigelow v. Bear*, 64 Kan. 887, 68 Pac. R. 73; *Matzenbaugh v. People*, 194 Ill. 108, 62 N. E. R. 546; *Kilburn v. Bennett*, 3 Metc. (Mass.) 199; *Cornville v. Brighton*, 39 Me. 333.

characterize his acts involving the question as to whether he has absconded or not.¹⁴

§ 10. **Utterances which are circumstantial evidence of an existing condition.**—Declarations which show indirectly an existing condition are admissible as original evidence. They are used inferentially and not testimonially. The rule against hearsay is applicable only to statements used testimonially. This important proposition, however, is sometimes overlooked. When a person's intention, motive, purpose or state of mind, is material to the issue, contemporaneous statements by him, which characterize such condition, are circumstantial original evidence. As said by Colt, J., "Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it."¹⁵

§ 11. **Spontaneous declarations which relate to the principal transaction, but which are not verbal acts.**—Spontaneous utterances which are strictly contemporaneous with the acts of which they form a verbal part are original evidence and

14. *Brady v. Parkes*, 67 Ga. 636.

15. *Shailer v. Bumstead*, 99 Mass. 112.

admissible as such. But spontaneous utterances which are made *after* the acts occur to which they relate are hearsay. These utterances are, however, admissible in evidence, provided they are not *narratives of past occurrences*. To be admissible they must be the natural, instinctive and spontaneous utterances of the declarant, resulting from nervous excitement produced by external manifestations, and made by him under circumstances which show that his reflective faculties at the time are, generally speaking, dormant. If the declarant has had sufficient time and opportunity to premeditate and deliberate, so as to enable him to frame statements in his own interest, the declarations are inadmissible. In applying this rule, however, there is a wide margin in the decisions. Some courts apply the rule strictly, while other courts do not.

§ 12. **Lord George Gordon's Case.**—In this celebrated case, in which Lord George Gordon was tried for treason, declarations of the mob which accompanied him when the alleged acts were committed were held admissible to prove the treasonable nature of the acts.¹⁶

§ 13. **Case of Regina v. Beddingfield.**—In this celebrated murder case a statement by the victim charging defendant with the act of cutting her throat, made by her while running from the room in which the act occurred, was held inad-

16. 21 Howard St. Tr. 514.

missible.¹⁷ The statement in this case was probably made not more than a minute or so after the deed was done and only a minute or two before the victim died. The ruling in this case has been frequently commented upon and severely criticised; and Cockburn, L. C. J., published a pamphlet in which he defended his ruling. The case, however, is very generally considered an extreme one.

§ 14. **Case of Ins. Co. v. Mosley.**—In this case the supreme court of the United States went to the other extreme. The action was brought on an accident policy. To prove that the deceased's death was accidental, statements by him that he had fallen down stairs, made to his wife and son after he had returned to his room, were held admissible.¹⁸ There were no marks on the body of the deceased, and, for aught that appears, half-an-hour or more may have elapsed between the alleged accident and the making of the statements.

§ 15. **Case of Mutual Life Ins. Co. v. Hillmon.**—In this case an action was brought on a life insurance policy and the insurance company claimed that the body found on the prairies was not the body of the assured. To prove that it was not, certain letters which expressed an intention on the part of the writer—one Walters—to leave the place at which he was staying, with-

17. 14 Cox Cr. Ca. 341. See 14 Am. Rev. 817 for criticisms of the decision in this case.

18. 8 Wall. (U. S.) 397.

in a day or so, and go with a Mr. Hillmon (the assured) to another place in a different state, were excluded by the trial court, and this ruling was held prejudicial error. If the declarant's intention was a fact material to the issue, contemporaneous declarations by him of that intention were admissible. Moreover, the declaration by him that a certain Mr. Hillmon was to accompany him was also admissible, assuming that the fact stated was material to the issue.¹⁹ As said by Beasley, C. J., "If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination . . . why may it not be proved in the same way that a designated person was to bear him company? At the time the words were uttered or written they imported no wrong doing to any one, and the reference to the companion who was to go with him was nothing more, as matters then stood, than an indication of an additional circumstance of his going. If it was in the ordinary train of events for this man to leave word or to state where he was going, it seems to me it was equally so for him to say with whom he was going."²⁰

§ 16. **Case of McCarrick v. Kealy.**—In this case the plaintiff sued for damages caused by defendant's dog biting her; and the trial court admitted in evidence a declaration of the plaintiff, made to her mother within five minutes

19. 145 U. S. 285.

20. *Hunter v. State*, 40 N. J. L. 495.

from the time she was injured, and as she was entering her parents' house, crying, that "Kealy's dog has bitten me." This was held prejudicial error. As said by Hall, J., "Proof of the fact that she was crying or complaining of pain, would have been admissible to show that she was then suffering, but not her statement of the cause of the pain. To render such a declaration admissible as a part of the *res gestae* it must characterize or explain some material act or occurrence, which it accompanies. The *res gestae*, the occurrence, which was material, was the act by which the plaintiff was injured. Her declarations made while the injuries were inflicted, were a part of that occurrence, and if they characterized or explained it would have been admissible. If not made during the continuance of the act, but after the act by which she was injured had been completed, they were but a narrative of a past event; and evidence of such declarations was objectionable as hearsay."²¹

§ 17. **Declarations of bystanders.**—Declarations of bystanders, which characterize the fact in issue, and which are made contemporaneously with it are admissible in evidence as forming part of the *res gestae*. Thus, in a celebrated case in which an action of trespass was brought for destroying a valuable painting, entitled *La Belle et la Bete* (Beauty and the Beast), which was on exhibition by the plaintiff who was an artist, the

21. 70 Conn. 642, 645.

defendant claimed that it was a libel on his sister; and Lord Ellenborough held that the declarations of the spectators, which supported the defendant's claim, and which were made while they were looking at the painting, were admissible to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law.²² On the other hand, the mere fact that a bystander makes a statement relating to a certain condition or occurrence, contemporaneously with it, does not render the statement admissible.²³ In Du Bost's case the declarations relating to the painting were made by the spectators generally.

§ 18. **Declarations of agents.**—The declarations of agents are frequently held admissible on the ground that they form part of the *res gestae*, whereas in many cases they do not. Statements by agents which relate to *past* facts are no part of the *res gestae*; and yet they may be legally relevant. Their admissibility depends upon rules of agency, and the rule against hearsay is not involved at all. If the statements are made within the scope of the agency they are binding on the principal; and if material to the issue they are admissible.²³ The fact that they are made a

22. Du Bost v. Beresford, 2 Camp. 511. See also, Chase v. Lowell, 151 Mass. 422; Schulze v. Jalonick, 74 Tex. Civ. App. 656, 660; Knapp v. Fuller, 55 Vt. 311; Galena & C. U. Ry. Co., 16 Ill. 558, 568.

23. Fairlee v. Hastings, 10 Ves. 123, 127; Seaboard Air Line Ry. v. Hubbard, 142 Ala. 546, 38 So. R. 750.

considerable length of time after the facts asserted occurred is immaterial. Much confusion and vagueness exist in the decisions owing to the fact that the admissibility of this class of declarations is often erroneously based upon the *res gestae* doctrine.²⁴ Declarations of an agent are not admissible to prove the relation of agency.²⁵

§ 19. **Declarations of prosecutrix in a rape case.**—This is another field in which many courts have applied the *res gestae* doctrine erroneously.²⁶ Declarations made by the prosecutrix *after* the of-

24. U. S. v. Gooding, 12 Wheat. (U. S.) 460, 6 L. ed. 693; Adams v. Hannibal & St. J. R. Co., 74 Mo. 553, 556, 41 Am. Rep. 333; Beckwith v. Mace, 140 Mich. 157, 103 N. W. R. 559; Bigley v. Williams, 80 Pa. St. 107, 116; North. Pac. Ry. Co. v. Kempton, 138 Fed. R. 992, 71 C. C. A. 246, White v. Miller, 71 N. Y. 118, 134, 27 Am. Rep. 13; Rahm v. Deig, 121 Ind. 283; Shafer v. Lacock, 168 Pa. St. 497; Cook v. Hunt, 24 Ill. 535; Jones v. Jones, 120 N. Y. 589; Vicksburg & M. Ry. Co. v. O'Brien, 119 U. S. 99. Gott v. Dinsmore, 111 Mass. 45.
25. White v. Miller, *supra* (In this case Andrews, J., says, "The general rule is that what one person says out of court is not admissible to charge or bind another. The exception is in cases of agency; and in cases of agency declarations of an agent are not competent to charge the principal merely that the relation of principal and agent existed when the declarations were made." It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to and were the business then depending, so that they constitute a part of the *res gestae*.)
26. State v. De Wolf, 8 Conn. 99. See also State v. Neal, 21 Utah, 151, 60 Pac. R. 510.

fense has occurred are no part of the *res gestae*. Nor are such declarations admissible as verbal acts. But declarations made by her contemporaneously with the offense, and which relate to it, are verbal acts and admissible as original evidence.

§ 20. Same. Various theories of admissibility.

—As to the admissibility of declarations of the prosecutrix in a rape case, made after the commission of the offense, various theories have been advanced. One theory is they are admissible to explain a self-contradiction. Another is they are admissible to corroborate other evidence given by the prosecutrix. And still another is they are admissible as spontaneous declarations. Under the first theory they are held admissible to rebut the natural presumption that would arise from silence on her part, and which would tend to impeach her. As said by Daggett, J., "If a female testifies that such an outrage has been committed on her person, an inquiry is at once suggested why it was not communicated to her friends. To satisfy such inquiry it is reasonable that she should be heard in her declaration that she did so complain."²⁶

§ 21. Same. Scope of admissibility.—As to the scope of admissibility of this class of declarations there is much conflict in the decisions. Some American cases hold that the details of the complaint, made by the prosecutrix to her mother or some other friend, are admissible;²⁷

27. *State v. Kinney*, 44 Conn. 153; *Burt v. State*, 23 Ohio St. 394; *State v. Meyers*, 46 Neb. 152.

while others hold that only the fact that the complaint was made is admissible.²⁸ The latter view is supported by the weight of American authority. This view was also the early English view.²⁹ According to the modern English rule, however, the details of the complaint are also admissible.³⁰

§ 22. The *res gestae* doctrine in bankruptcy cases.—The doctrine of *res gestae* has been also misapplied in bankruptcy cases.³¹ A declaration by a bankrupt, made a month after the act of bankruptcy was committed, may be admissible, but, not at all because it constitutes a part of the *res gestae*. As previously stated, if a person's intention, at the time he declares it, is material to the issue, his declaration is admissible to show it. And this is the true ground of admissibility of declarations made by a bankrupt after the act of bankruptcy is committed, except where they are admissible as admissions.

§ 23. The acts of which the declarations form a part must be legally relevant.—Declarations to be admissible as part of the *res gestae* must be a verbal part of acts which are themselves admissible *per se*. Thus, in an action to recover damages for an alleged obstruction of light by cer-

28. *People v. Duncan*, 104 Mich. 460; *Polson v. State*, 137 Ind. 519, 523; *Barnet v. State*, 83 Ala. 40; *People v. Mayes*, 66 Cal. 597; *Baccia v. People*, 41 N. Y. 265.

29. *Reg. v. Walker*, 2 Moo. & Rob. 212.

30. *Reg. v. Lillyman*, 2 Q. B. D. 167.

31. *Ridley v. Gyde*, 9 Bing. 349; *Rawson v. Haigh*, 9 J. B. Moore 217; *Robson et al. v. Kemp et al.*, 4 Esp. 233.

tain alterations made by the defendant in his buildings which adjoined those of the plaintiff, declarations by prospective guests who had rejected the rooms, alleging as a ground of their objection the darkness of the rooms, were held inadmissible. As said by O'Brien, J., "The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath, or subject to cross-examination; and, though they were accompanied by acts tending to show that those parties really entertained the opinions they so expressed, still their statements would not on that account be exempted from the general rule excluding hearsay evidence where the acts which they accompanied would not be evidence *per se*."³²

§ 24. **Modern tendency of the courts.**—As regards the modern tendency of the courts in applying the doctrine of *res gestae*, the authorities are not agreed. Thus, Swayne, J., says, "The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine."³³ While Bigelow, C. J., says, "The tendency of recent decisions has been to restrict

32. *The Gresham Hotel Co. v. Manning*, Irish Rep., 1 C. L. 125. See also, *Doe d. Wright v. Tatham*, 5 Cl. & Fin. 670; *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36; *Lane v. Bryant*, 9 Gray (Mass.) 245; *Bradford v. Cunard Co.*, 147 Mass. 57. These cases hold that opinion evidence cannot be introduced by reported declarations.

33. *Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397. See also, *Jack v. Life Assoc.*, 113 Fed. R. 49, 51 C. C. A. 36.

within the most narrow limits this species of testimony.”³⁴

§ 25. **Case of White v. City of Marquette.**—In this case declarations made an hour after the accident, a mile from the place where it occurred, in response to questions, were held inadmissible.³⁵

§ 26. **Case of Rothrock v. City of Cedar Rapids.**—Declarations relating to the place and manner in which the plaintiff sustained her injuries, made half-an-hour later upon her arrival at home, and while she was still suffering from the injuries and carrying the marks on her, were held admissible.³⁶

§ 27. **Case of Vicksburg, etc., Ry. Co. v. O'Brien.**—In this case the trial court admitted in evidence a statement made by the engineer of the train, between ten and thirty minutes after the accident occurred, that the train was moving at the time of the accident at the rate of eighteen miles an hour. This ruling was held prejudicial error. The statement “did not accompany the act from which the injuries arose. It was in its essence, the mere narration of a past occurrence, not a part of the *res gestae*,—simply an assertion or representation, in the course of conversation,

34. *Com. v. Hackett*, 2 Allen (Mass.) 136, 140. See also, *Lund v. Tyngsborough*, 9 (Cush.) Mass. 36.

35. 140 Mich. 310, 103 N. W. R. 698. See also, *Chretien v. Ry. Co.*, 113 La. Ann. 761, 37 So. R. 716, 104 Am. St. Rep. 519.

36. 128 Ia. 252, 103 N. W. R. 475.

as to a matter not pending, and in respect to which his authority as engineer had been fully exerted.”³⁷

§ 28. **Case of Hutcheis v. Ry. Co.**—The plaintiff in this case, while in the act of falling from a street car, exclaimed, “Yes, let down the steps after I fall.” This declaration was clearly admissible.³⁸

§ 29. **Case of Springfield, etc., Ry. Co. v. Puntenney.**—The defendant company in this case sought to introduce in evidence a statement by a cab driver, made just after the accident, that it was all his fault. The court held, however, that it was not admissible. “The event had fully transpired, and what was said was purely narrative of a past transaction fully ended, and did not characterize or in any way relate to a transaction then taking place.”³⁹

§ 30. **Case of Com. v. Van Horn.**—This was a murder case; and a declaration characterizing the act, made by the victim while blood was gushing from a wound in her throat, was clearly admissible.⁴⁰

§ 31. **Case of Lander v. People.**—In this case a declaration made by a third party to her companion, the day after the offense was committed, upon recognizing the perpetrator of the deed,

37. 119 U. S. 99.

38. 128 Ia. 279, 103 N. W. R. 779.

39. 200 Ill. 9.

40. 188 Pa. St. 143.

"There goes the man," was held admissible. Also the reply of her companion, who also recognized him, "Yes, there he goes."⁴¹

41. 104 Ill. 248.

CHAPTER XVII.

Opinion Evidence.

§ 1. **In general.**—As a general rule opinion testimony is inadmissible. The function of witnesses is to testify to facts, and the function of the jury to draw inferences from them. Moreover, the latter may not draw inferences which the facts as proved do not justify.¹ "The general rule is well settled that the province of a witness is to state facts, and that of the jury is to draw conclusions from them."² To this rule, however, there are exceptions, both real and apparent.

§ 2. **Apparent exceptions to the rule.**—The apparent exceptions to the rule which excludes opinion testimony are statements made by non-

1. Berckmans, 16 N. J. Eq. 122.

2. Musick v. Latrobe, 184 Pa. St. 375, 39 Atl. R. 226. See also the same effect, Largan v. Central Ry. Co., 40 Cal. 272; Perry v. Graham, 18 Ala. 822; Con. Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 618; Penn. Co. v. Coulan, 101 Ill. 93; City of Parsons v. Lindsay, 26 Kan. 426, 432; Spencer v. Ry. Co., 120 Mo. 154, 23 S. W. R. 126, 22 L. R. A. 668; People v. Sharp, 107 N. Y. 427, 462, 14 N. E. R. 319, 1 Am. St. Rep. 851.

expert witnesses which relate to appearances, conditions, etc., of persons, animals and things, gained by general observation. Thus, statements of a non-expert witness that a certain person looked badly;³ appeared ill;⁴ acted in an irrational manner;⁵ seemed unfriendly;⁶ appeared pale;⁷ spoke affectionately;⁸ seemed to be weak;⁹ looked scared;¹⁰ seemed sincere;¹¹ appeared to be satisfied;¹² appeared to be sober;¹³ appeared to be intoxicated;¹⁴ appeared tired;¹⁵ seemed attached to a certain person;¹⁶ appeared to be suf-

3. *Bailey v. Centreville*, 108 Ia. 20, 78 N. W. R. 831.
4. *West Chicago St. Ry. Co. v. Fishman*, 169 Ill. 196, 48 N. E. R. 447.
5. *Paine v. Alderich*, 133 N. Y. 544, 30 N. E. R. 725; *Charter Oak Life Ins. Co. v. Rodel*, 95 U. S. 232.
6. *Blake v. People*, 73 N. Y. 586.
7. *Hall v. Austin*, 73 Minn. 134, 75 N. W. R. 1121.
8. *Polk v. State*, 62 Ala. 237; *Appeal of Spencer*, 77 Conn. 638, 60 Atl. 289.
9. *Birming., R. & F. Co. v. Franscomb*, 124 Ala. 621, 27 So. 508.
10. *State v. Ramsay*, 82 Mo. 133, 137.
11. *Horn v. State*, 12 Wyo. 80, 73 Pac. R. 705.
12. *Plano Mfg. Co. v. Kantenberger*, 121 Ia. 213, 96 N. W. R. R. 743.
13. *Cook v. Ins. Co.*, 82 Mich. 12, 47 N. W. R. 568.
14. *People v. Eastwood*, 14 N. Y. 562; *State v. Cather*, 121 Ia. 106, 96 N. W. R. 722; *Burt v. Burt*, 168 Mass. 204, 46 N. E. R. 622.
15. *State v. Ward*, 61 Vt. 153, 181, 17 Atl. R. 483.
16. *McKee v. Nelson*, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384.

fering;¹⁷ was nice looking;¹⁸ showed mental anguish;¹⁹ looked like he was insane,²⁰ etc., belong to this class. Also statements relating to the identity of persons;²¹ the value of certain property;²² the speed of an ordinary train;²³ the distance a common headlight will project light on a track;²⁴ the capacity of a certain sawmill,²⁵ etc. They express an inference or conclusion based upon observation of the appearance, manner, etc., of other persons. In a substantial sense, however, they are statements of facts, and are

17. *Chicago & E. I. Ry. Co. v. Randolph*, 199 Ill. 126, 65 N. E. R. 142; *Werner v. Ry. Co.*, 105 Wis. 300, 81 N. W. R. 416.
18. *Childs v. Muckler*, 105 Ia. 279, 75 N. W. R. 100.
19. *Sherwell v. Telg. Co.*, 117 N. C. 352, 23 S. E. R. 277.
20. *Conn., etc., Life Ins. Co. v. Lathrop*.
21. *Robertson v. State*, 40 Fla. 509, 24 So. R. 474; *Com. v. Kennedy*, 170 Mass. 181, 48 N. E. R. 770; *Keith v. State*, 157 Ind. 376, 61 N. E. R. 716 (of a corpse); *State v. Folwell*, 14 Kan. 105 (by peculiar wagon tracks); *Morris v. State*, 124 Ala. 44, 27 So. R. 336 (by shoe tracks). *Contra* *People v. Gotshall*, 123 Mich. 474, 82 N. W. R. 274; *Terry v. State*, 118 Ala. 79, 23 So. 776; *Ogden v. People*, 134 Ill. 599 (by voice); *Com. v. Scott*, 123 Mass. 224.
22. *Latham v. Brown*, 48 Kan. 190; *Terre Haute Ry. Co. v. Crawford*, 100 Ind. 550; *Penn. Ry. Co. v. Bunnell*, 81 Pa. St. 426; *Swan Co. v. Middlesex*, 101 Mass. 173; *Raggan v. Kansas City Ry. Co.*, 111 Mo. 456; *Huff v. Hall*, 56 Mich. 456.
23. *Atchison, T. & S. F. Ry. Co. v. Holloway*, 71 Kan. 1, 80 Pac. R. 31.
24. *St. Louis, M. & S. E. Ry. Co. v. Shannon*, 76 Ark. 166, 88 S. W. R. 851.
25. *Fletcher v. Prestwood*, 143 Ala. 174, 38 So. R. 847.

legally relevant as such. Psychologically speaking, all testimony of witnesses is the expression of opinion; but legally speaking it is usually the expression of facts. Statements made by ordinary witnesses, based upon observation, are frequently designated opinion evidence, but, as previously stated, in a substantial sense they are statements of facts.²⁶ They are not, however, in the true sense, expert testimony.²⁷

§ 3. Summarized statement in the case of Hardy v. Merrill.—" Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recog-

26. *Connecticut, etc., Life Ins. Co. v. Lathrop*, 111 U. S. 612, 620 (In this case Harlan, J., says, "The truth is, the statement of a non-professional witness as to the sanity of an individual, whose appearance, manner, habits and conduct came under his personal observation, is not the expression of mere opinion. In form, it is opinion, because it expresses an inference or conclusion based upon observation of the appearance, manner and motions of another person, of which a correct idea cannot well be communicated in words to others, without embodying, more or less, the impressions or judgment of the witness. But, in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunity to observe his conduct and appearance is but the statement of a fact.").

27. *Com. v. Sturtevant*, 117 Mass. 122, 19 Am. Rep. 401.

nized rule or principle, all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health, questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention . . . Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained."²⁸

§ 4. **Expert testimony of facts.**—Expert testimony of facts and expert opinion testimony should be carefully distinguished. They are not synonymous. The former is not opinion at all. It is testimony of facts by persons specially qualified to give it. Thus, testimony of a medical expert as to the functions of certain organs of the human body;²⁹ or testimony of a legal expert as to the unwritten law of a foreign

28. 56 N. H. 227, 22 Am. Rep. 448.

29. *Young v. Makepeace*, 103 Mass. 50.

country,³⁰ is expert testimony of a fact. It is not, however, expert *opinion* testimony. If the testimony as to the unwritten law is not conflicting the question is one for the court to decide.³¹ But where the testimony is conflicting the question is one for the jury to decide.³²

Where the question is the meaning of a foreign statute which has not been interpreted by the courts of the foreign state expert opinion testimony is inadmissible.³³ On the other hand, if the question is the provisions of the statute expert opinion testimony is admissible. An exemplified copy of the statute is not essential.³⁴

§ 5. **Questions of sanity of testator.**—Where the sanity of a testator is the fact in issue, ordinary witnesses, who have personal knowledge of the habits, acts and declarations of the deceased, are generally held to be competent witnesses.³⁵ Some courts, however, hold the contrary. These

30. *Liverpool & G. W. S. Co. v. Phoenix Ins. Co.*, 129 U. S. 395, 445; *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207; *Mowry v. Chase*, 100 Mass. 79, 86.

31. *Christiansen v. Graver Tank Works*, 223 Ill. 142, 79 N. E. R. 97; *Hooper v. Moore*, 50 N. C. 130.

32. Note, 20 Harv. Law Rev. 575.

33. *Clark v. Elkins*, 38 Wash. 376, 80 Pac. R. 556, 107 Am. St. Rep. 858.

34. *Barrows v. Downs*, 9 R. I. 446, 11 Am. Rep. 283; *Sussex Peerage Case*, 11 Cl. & F. 85.

35. *Connecticut, etc., Life Ins. Co. v. Lathrop*, *supra*; *Dominick v. Randolph*, 124 Ala. 557, 27 So. R. 481; *Queenan v. Oklahoma*, 190 U. S. 458; *Shaver v. McCarthy*, 110 Pa. St. 339; *State v. Bryant*, 93 Mo. 273; *Keithly v. Stafford*, 126 Ill. 507; *Grube v. State*, 117 Ind. 277.

courts take the view that juries are as competent to form opinions from the facts stated as non-expert witnesses.³⁶ The former view, however, is supported by the great weight of authority. And even those courts that support the narrow view hold that the subscribing witnesses to a will are competent to testify to the testator's mental capacity, because they are presumed to have given careful attention to this matter.³⁷ Before a non-expert witness is allowed to state his opinion upon the question of sanity he is required to state facts within his own observation and knowledge upon which his opinion is based.³⁸

§ 6. Expert opinion evidence.—Expert opinion evidence constitutes the real exception to the rule which excludes opinion testimony in its true sense. Two things are essential to justify admitting this class of testimony. First, the fact in issue must be of such a nature as to require expert opinion evidence.³⁹ Secondly, the witness who gives it must be specially qualified as an ex-

36. *In re Meyer's Will*, 184 N. Y. 54, 76 N. E. R. 920; *Hastings v. Rider*, 99 Mass. 622; *Wyman v. Gould*, 47 Me. 159.

37. See comprehensive note, 38 L. R. A. 715-722.

38. *Chicago Union Traction Co. v. Lawrence*, 211 Ill. 373, 71 N. E. R. 1024; *Hempton v. State*, 111 Wis. 127, 86 N. W. R. 596; *Wise v. Foote*, 81 Ky. 10; *State v. Potts*, 100 N. C. 457; *Chase v. Winans*, 59 Md. 475.

39. *Louisville, etc., Ry. Co. v. Brinckerhoff*, 119 Ala. 606, 24 So. R. 892; *Manayunk Fifth Mut. Bldg. Soc. v. Holt*, 184 Pa. St. 572, 39 Atl. R. 293.

pert upon the subject in issue.⁴⁰ These are preliminary questions of fact for the court to decide.⁴¹ If the subject in issue is of such a nature that the jury are as capable as the witness of forming an opinion from the facts given, opinion testimony is inadmissible.⁴²

§ 7. Chief features of expert opinion evidence.

—The characteristic features of expert opinion evidence are as follows: (1) It is testified to by a witness who is specially qualified to give it. (2) It relates to a subject involving technical knowledge not possessed by an ordinary witness. (3) It is based upon facts which are proved or assumed to be true.

§ 8. Reason for admitting expert opinion testimony.—The reason for admitting expert opinion testimony is necessity. As said by Mr. Jones, "If the non-professional witness must on grounds of necessity be sometimes allowed to state the inferences which irresistibly rise in his

40. *Grainer v. Still*, 187 Mo. 197, 85 S. W. R. 114, 70 L. R. A.

49 (In this case it was held that an expert medical witness, not an osteopath, and unfamiliar with osteopathic treatment, was incompetent to give expert opinion evidence involving that mode of treatment.).

41. *Mont. Ry. Co. v. Warren*, 137 U. S. 348, 353; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 85, 7 N. E. R. 743, 57 Am. Rep. 82; *Teele v. City of Boston*, 165 Mass. 89, 42 N. E. R. 506; *Stillwell Mfg. Co. v. Phelps*, 130 U. S. 520; *White v. State*, 133 Ala. 122, 32 So. R. 139; *White v. McPherson*, 183 Mass. 533, 67 N. E. R. 643.

42. *McLaughlin v. Webster*, 141 N. Y. 76; *Mfg. Co. v. Dorgan*, 58 Fed. R. 945.

mind from those minute facts which he cannot detail, there are still stronger reasons for receiving under proper limitations, the opinions of those skilled in matters of trade or science.”⁴³ Where, however, the facts are such that their bearing on the issue can be estimated by ordinary men without special knowledge or training, opinion testimony is inadmissible. “Opinions are never received if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding. The ordinary affairs of life cannot be the subject of expert testimony.”⁴⁵

§ 9. The danger in admitting opinion testimony.—In deciding disputes concerning matters of fact parties to the litigation are entitled to the experience and judgment of the jury; and the danger which arises in admitting the opinions of witnesses is that the jury may substitute these opinions for their own.⁴⁶ “The verdict should express the jury’s own independent conclusions from the facts and circumstances in evidence, and not be the echo of the opinions of witnesses, perhaps not unbiased.”⁴⁷

§ 10. When the danger must be encountered.—The danger which arises in admitting opinion

43. Jones on Evid. § 367 (369).

44. Auberle v. McKeesport, 179 Pa. St. 321.

45. Am. & Eng. Encyc. of Law (1st ed.), vol. 7, p. 493.

46. Hames v. Brownlee, 63 Ala. 277; Robertson v. Stark, 15 N. H. 109.

47. Hames v. Brownlee, *supra*.

testimony must be encountered in two classes of situations: "(1) The first situation admitting the evidence is where the average witness cannot state and the average juror cannot co-ordinate into a reasonable mental result the sensations produced on the witness' mind by a number of minute and interblending phenomena. (2) The second situation is presented where the tribunal by whose experience on the subject, and the necessary qualifications for dealing with the subject cannot within the time available be conferred on the jury by the parties or their witnesses."⁴⁸

§ 11. **Basis of expert opinion evidence.**—As a general rule expert opinion evidence is based upon a hypothetical question.⁴⁹ It may, however, be based upon personal knowledge.⁵⁰ Where the opinion is based upon personal knowledge the facts should be first given by the witness.⁵¹ And where a physician bases his opinion, as to a per-

48. Cyc., vol. 17, p. 41. See also, *Missouri, etc., Tel. Co. v. Vandevort*, 67 Kan. 269, 72 Pac. R. 771; *Clark v. Baird*, 9 N. Y. 183.

49. *Hall v. Rankin*, 87 Ia. 261, 54 N. W. R. 217; *Miller v. Smith*, 112 Mass. 470, 475; *Louisville, N. A. & C. Ry. Co. v. Wood*, 113 Ind. 544, 14 N. E. R. 572, 16 N. E. R. 197; *Hardiman v. Brown*, 162 Mass. 585, 39 N. E. R. 192 and note.

50. *Trans. Line v. Hope*, 95 U. S. 297; *Brown v. Huffard*, 69 Mo. 305.

51. *Raub v. Carpenter*, 187 U. S. 159; *Louisville Ry. Co. v. Falvey*, 104 Ind. 409; *Flanigan v. State*, 106 Ga. 109, 32 S. E. R. 80.

son's sanity, upon symptoms and circumstances, he should first state the symptoms and circumstances.⁵² An expert opinion may not be based upon a hypothetical question which is a compound of positive assertions and conclusions,⁵³ nor upon the opinions of other experts; nor, as a general rule, upon hearsay.⁵⁴ A physician, however, in giving this class of evidence, may base his opinion partly upon statements of his patient which describe his sufferings, symptoms, etc.⁵⁵ He may not, however, base it partly upon personal knowledge and partly upon statements made by third persons.⁵⁶ As a general rule expert opinion may not be based upon all the evidence in the case.⁵⁷ It may, however, in the discretion of the court, be based upon all the evidence of one or more witnesses, provided such evidence is uncontradicted, free from obscurity and assumed to be true.⁵⁸ It may also be based in part upon facts known to be true but which are not included in the hypothetical question, pro-

52. *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106.

53. *Haish v. Payson*, 107 Ill. 365.

54. *Flanigan v. State*, *supra*; *Polk v. State*, 36 Ark. 117.

55. *Quaife v. Chicago & N. W. Ry. Co.*, 48 Wis. 513, 33 Am. Rep. 821.

56. *Heald v. Thing*, 45 Me. 392; *Louisville Ry. Co. v. Shires*, 108 Ill. 617.

57. *People v. McElvaine*, 121 N. Y. 250, 255, 24 N. E. R. 465, 80 Am. St. Rep. 820.

58. *Hand v. Brookline*, 126 Mass. 324; *Bennett v. State*, 57 Wis. 69, 46 Am. Rep. 26; *McCullom v. Seward*, 62 N. Y. 316.

vided this is made to appear in the question asked. Some courts, however, have held that it must be based on the personal knowledge of the witness or on a hypothetical question.⁵⁹

§ 12. Scope of the hypothetical question.—

The hypothetical question upon which expert opinion testimony is based must comprise evidence in the case, or legally relevant facts offered to be proved.⁶⁰ It is not essential, however, that it embody even the substance of all the evidence.⁶¹ It must be, however, on the whole, a fair statement of the salient facts.⁶² A hypothetical question which unfairly embodies some of the facts and omits other material facts should be rejected.⁶³ If the jury disbelieve material assumed facts upon which the opinion is based they should give no weight to the opinion. Moreover, the court should so instruct them.⁶⁴

§ 13. Limitations of expert opinion evidence.

—It is not within the province of an expert wit-

59. *Grand Rapids Ry. Co. v. Huntley*, 38 Mich. 537; *Hunt v. State*, 9 Tex. App. 166.

60. *People v. Harris*, 136 N. Y. 423; *Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082.

61. *Chicago & E. I. Ry. Co. v. Wallace*, 202 Ill. 129, 66 N. E. R. 1096; *Brooks v. Sioux City*, 114 Ia. 641, 87 N. W. R. 682.

62. *Howard v. People*, 185 Ill. 552, 57 N. E. R. 441; *Cole v. Fall Brooks C. Co.*, 159 N. Y. 59, 53 N. E. R. 670; *State v. Anderson*, 10 Ore. 448.

63. *Schaidler v. Ry. Co.*, 102 Wis. 564, 78 N. W. R. 732; *In re Barber's Estate*, 63 Conn. 393, 27 Atl. R. 973.

64. *State v. Peel*, 23 Mont. 358, 59 Pac. R. 169, 75 Am. St. Rep. 529; *People v. Foley*, 64 Mich. 148.

ness to decide questions of fact. This function belongs to the jury. Hence, when a hypothetical question is so framed that it calls for an opinion which virtually amounts to an expression of the witness as to the merits of some phase of the case it is faulty and should be rejected.⁶⁵ Thus, a hypothetical question so framed that it calls for an expert opinion as to whether certain acts constituted suicide or murder;⁶⁶ what constitutes "practicing medicine";⁶⁷ whether certain acts constituted negligence;⁶⁸ whether the statements of a certain witness are true;⁶⁹ which parent was better fitted for the custody of their children;⁷⁰ whether the time had arrived for the accused, who had pleaded self-defense, "either to run or fight";⁷¹ whether certain repairs were sufficient;⁷² whether certain acts were neces-

65. Page v. State, 61 Ala. 16; Anderson v. State, 104 Ala., 83, 16 So. 108; Hamrick v. State, 134 Ind. 324, 327, 34 N. E. R. 3; Evans v. Evans, 123 Ia. 92, 98 N. W. R. 584; State v. Myers, 54 Kan. 206, 38 Pac. R. 296; People v. Lehr, 196 Ill. 361, 63 N. E. R. 725.

66. Furbush v. Maryland Casualty Co., 131 Mich. 234, 91 N. W. R. 135, 100 Am. St. Rep. 605.

67. People v. Lehr, *supra*.

68. Brant v. Lyons, 60 Ia. 172; Ballard v. New York Ry. Co., 126 Pa. St. 141; East Tenn. Ry. Co. v. Wright, 76 Ga. 532.

69. Holleman v. Cabanne, 43 Mo. 568.

70. State v. Giroux, 19 Mont. 147, 47 Pac. R. 798.

71. Lowman v. State, 109 Ga. 501, 34 S. E. R. 1019.

72. Dammann v. St. Louis, 152 Mo. 186, 53 S. W. R. 932.

sary;⁷³ whether a given pugilistic encounter amounted to a fight;⁷⁴ whether two given statements are similar;⁷⁵ who was rightfully entitled to certain money;⁷⁶ whether good judgment was exercised;⁷⁷ whether the operation of certain machinery was safe;⁷⁸ whether certain timber was liable to frighten horses;⁷⁹ as to the possibility of committing rape on a mature woman;⁸⁰ whether a given gate is sufficient to turn cattle;⁸¹ whether a given object was likely to cause injury;⁸² how a certain act should have been

73. *Kelly v. West Bend*, 101 Ia. 669, 70 N. W. R. 726; *Chicago R. I. & P. Ry. Co. v. Holmes*, 68 Neb. 826, 94 N. W. R. 1007.
74. *Seville v. State*, 49 Ohio St. 117, 30 N. E. R. 621, 15 L. R. A. 516.
75. *State v. McLaughlin*, 126 N. C. 1080, 35 S. E. R. 1037.
76. *Martin v. Connell*, 3 Neb. 240, 91 N. W. R. 516.
77. *Phifer v. Ry. Co.* 122 N. C. 940, 29 S. E. R. 578; *Auberle v. McKeesport*, 179 Pa. St. 321, 36 Atl. 212; *Stowe v. Bishop*, 58 Vt. 498, 56 Am. Rep. 569.
78. *Hurst v. Ry. Co.* 163 Mo. 309, 63 S. W. R. 695, 85 Am. St. Rep. 539; *contra*, *Gundlach v. Schott*, 192 Ill. 509, 61 N. E. R. 332, 85 Am. St. Rep. 348.
79. *Burns v. Farmington*, 31 N. Y. 364. *Contra* *Clinton v. Howard*, 42 Conn. 294.
80. *Lawlor v. Wolff*, 180 Mass. 448, 62 N. E. R. 973; *State v. Dusenberry*, 112 Mo. 277, 20 S. W. R. 461; *State v. Peterson*, 110 Ia. 647, 82 N. W. R. 329. See also, *People v. Clark*, 33 Mich. 112.
81. *Collins v. Chicago, etc., Ry. Co.*, 122 Ia. 231, 97 N. W. R. 1103.
82. *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. R. 447; *People v. Detroit & S. P. Ry. Co.*, 125 Mich. 366, 84 N. W. 290; *Orr v. State*, 117 Ala. 69, 23 So. R. 696.

done;⁸³ what authority a given person had, or what duty rested upon him, in view of certain facts;⁸⁴ whether it was possible to commit robbery in the manner charged;⁸⁵ what the earning capacity of a given person is;⁸⁶ whether a given well produces gas in paying quantities;⁸⁷ whether a given photograph is obscene;⁸⁸ as to the public utility of a proposed highway;⁸⁹ whether the plaintiff resembles an alleged libelous picture;⁹⁰ whether certain acts of a physician constituted malpractice;⁹¹ whether a young child of a given age had capacity to exercise ordinary care;⁹² whether a person could have been cognizant of a given thing thru the sense of sight or hearing;⁹³ whether bankers would discount a given note written on tracing paper;⁹⁴ whether it was

83. *Springfield Ry. Co. v. Welsh*, 155 Ill. 511, 40 N. E. R. 1034; *contra*, *O'Brien v. Look*, 171 Mass. 36, 50 N.E.R. 458.

84. *Lipscomb v. Ry. Co.*, 95 Tex. 4, 64 S. W. R. 923, 93 Am. St. Rep. 804.

85. *People v. Morrigan*, 29 Mich. 4.

86. *Wilcox v. Wilmington City Ry. Co.*, 2 Pennew. (Del.) 157, 44 Atl. R. 686.

87. *Ohio Oil Co. v. McCrory*, 14 Ohio Cir. Ct. 304, 7 Ohio Cir. Dec. 344.

88. *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635.

89. *Thompson v. Deprez*, 96 Ind. 67.

90. *Squire v. Press Pub. Co.*, 58 N. Y. 362, 68 N. Y. Supp. 1028.

91. *Hoener v. Koch*, 84 Ill. 408.

92. *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188.

93. *Welch v. Ry. Co.*, 176 Mass. 393, 57 N. E. R. 668; *McGeary v. Ry. Co.*, 21 R. I. 76, 41 Atl. R. 1007. *Contra*, *Olson v. Ry. Co.*, 152 Mo. 426, 54 S. W. R. 470.

94. *Rowland v. Fowler*, 37 Conn. 348.

safe for a guest at a given inn to keep his money in a locked trunk;⁹⁵ whether a dwelling house would take fire from a burning barn twenty-six feet away;⁹⁶ whether the erection of adjacent buildings increased the danger from fire;⁹⁷ whether it was safe to stand any other way than flatwise in coupling cars;⁹⁸ whether a given piece of paper had been used as wadding, and as such shot from a gun;⁹⁹ whether glass in a sidewalk, placed there to afford light below, was unsafe owing to its slipperiness;¹⁰⁰ whether a fire, set under given circumstances, would have spread to adjoining land;¹ as to what part of a hill was its highest part;² whether a given physician has honorably and faithfully discharged his duty to his professional brethren,³ or, what the original purpose was in building a wall that was erected between twenty and thirty years ago,⁴ is faulty and should be rejected.

§ 14. Opinion testimony on questions pertaining to values.—Opinion testimony of the value of property is often admitted in evidence. As said by Nelson, C. J., "It is everyday's practice

95. *Taylor v. Mounot*, 4 Duer (N. Y.) 116.

96. *State v. Wilson*, 65 Me. 74.

97. *Franklin Fire Ins. Co. v. Gruver*, 100 Pa. St. 266.

98. *Belair v. The C. & N. W. R. Ry. Co.*, 43 Ia. 667.

99. *Manke v. People*, 24 Hun (N. Y.) 316, 78 N. Y. 611.

100. *City of Chicago v. McGiven*, 78 Ill. 347.

1. *Higgins v. Dewey*, 107 Mass. 494.

2. *Hovey v. Sawyer*, 5 Allen (Mass.) 554.

3. *Ramadge v. Ryan*, 9 Bing. (N. C.) 333.

4. *Sinnott v. Mullin*, 82 Pa. St. 342.

to take the opinion of witnesses as to the value of property—persons who are supposed to be conversant with the particular article in question, and of its value in the market: as a farmer, or dealer in, or person conversant with the article, as to the value of land, cattle, horses, produce, etc. These cases all stand upon the general ground of peculiar skill and judgment in the matters about which opinions are sought.”⁵ The ground of admissibility is necessity.⁶

Opinions as to values may be given by ordinary witnesses.⁷ As said by Gray, J., “These opinions are admitted, not as being the opinions of experts, strictly so called, for they are not founded on special study or training, or professional experience, but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable evidence of the fact to be proved.”⁸ The two essentials of qualification, as given by Mr. Wharton,

5. *Lincoln v. Saratoga, etc., Ry. Co.*, 23 Wend. (N. Y.) 425, 433. See also, *Sexton v. Lamb*, 27 Kan. 426; *Edmonds v. City of Boston*, 108 Mass. 438; *Cantling v. Hannibal, etc., Ry. Co.*, 54 Mo. 385; *Hough v. Cook*, 69 Ill. 381.

6. *Dalzell v. City of Davenport*, 12 Ia. 437, 440; *Wyman v. Lexington, etc., Ry. Co.*, 13 Metc (Mass.) 316, 326.

7. *Swan v. Middlesex*, 101 Mass. 173; *Keables v. Christie*, 47 Mich. 595; *Cooper v. Randall*, 59 Ill. 317, 320. *Sullivan v. Lear*, 23 Fla. 463.

8. *Swan v. Middlesex*, *supra*.

are as follows: "First, a knowledge of the intrinsic properties of the thing. Secondly, a knowledge of the state of the markets. As to such intrinsic properties as are occult and out of the range of common observers, experts are required to testify; as to the properties which are cognizable by an observer of ordinary business sagacity, being familiar with the thing, such an observer is permitted to testify."⁹

Where the subject of value is susceptible of specific proof opinion testimony is inadmissible.¹⁰ And it has been held that such testimony is inadmissible where the *data* upon which the opinions are based lack that certainty of relation which entitles them to authority as a law of science.¹¹ Where the deductions are conjectural, or general, rather than specific, the opinions are inadmissible.¹² On the other hand, it is not essential that the witness have personal knowledge of the thing whose value is the subject of the investigation.¹³ Nor, in the case of land, is it essential that the witness has dealt in land in the neighborhood in which the land in question lies.¹⁴

§ 15. Opinion testimony on questions pertaining to amount of damages sustained.—As a gen-

9. 1 Whart. Evid., § 447.

10. Schernerhorn v. Tyler, 11 Hun (N. Y.) 551; Page v. Hazard, 5 Hill (N. Y.) 603; Patten v. United States, 15 Ct. of Cl. 288.

11. Atchison, etc., Ry. Co. v. United States, 15 Ct. of Cl. 126.

12. Sturgis v. Knapp, 33 Vt. 486.

13. Sarle v. Arnold, 7 R. I. 582.

14. Phillips v. Terry, 3 Abb. N. Y. Decis. 607, 609.

eral rule opinion testimony as to the amount of damages sustained in a given case is inadmissible.¹⁵ This is owing to the fact that such testimony is precisely the question the jury are to decide.¹⁶ The witness should not usurp the function of the jury. The rule obtains even where the witness is the plaintiff.¹⁷ It is not, as a general rule, permissible for a witness to estimate the damages a party has sustained by the doing or omitting to do a particular act. That is not a fact, but a matter of opinion, to be deduced from competent evidence by the court or jury trying the issues of fact.¹⁸ Thus, opinion testimony has been held inadmissible to show the amount of damages sustained by injury to the

15. *Chicago, etc., Ry. Co. v. Muller*, 45 Kan. 85, 25 Pac. 210; *Matter of First St.*, 58 Mich. 641, 26 N. W. R. 159; *Hartley v. Keokuk, etc., Ry. Co.*, 85 Ia. 455, 52 N. W. R. 352; *Fremont, etc., Ry. Co. v. Marley*, 25 Neb. 138, 40 N. W. R. 948, 13 Am. St. Rep. 482 (damage to crops). *Roberts v. Ry. Co.*, 128 N. Y. 455, 467, 28 N. E. R. 486, 13 L. R. A. 499.
16. *Lincoln v. Ry. Co.*, 23 Wend. (N. Y.) 425. See also, cases cited in foot-note 115.
17. *Whipple v. Rich.*, 180 Mass. 477, 63 N. E. R. 5; *Ohio, etc., Ry. Co. v. Nickless*, 71 Ind. 271; *Hunt v. St. Louis, etc., Ry. Co.*, 94 Mo. 255, 7 S. W. R. 1, 4 Am. St. Rep. 374 (loss of child's services); *Avery v. New York Cent., etc., Ry. Co.*, 121 N. Y. 31, 24 N. E. R. 20 (breach of contract).
18. *St. Louis, etc., Ry. Co. v. Law*, 68 Ark. 218, 223, 57 S. W. R. 258.

person;¹⁹ by breach of contract;²⁰ by injury to real estate;²¹ by taking property by right of eminent domain;²² etc. In the case of condemnation proceedings, however, there is much conflict in the decisions. In many states opinion testimony in this class of cases has been held admissible.²³ In these cases the question is the difference between the value of the property before and after the proceedings. The tendency of modern decisions is to admit this class of testimony. This seems to be a sensible view. To require the witness to state the value of the property before the proceedings and the value of the property after the proceedings and leave the mere matter of subtraction to the jury seems childish. Where the question calls for an estimate of damage which is no more than a short way of stating the difference in the value of the property before and after the condemnation proceedings the wit-

19. *Whipple v. Rich*, *supra*; *De Wald v. Ingle*, 31 Wash. 616, 72 Pac. R. 469, 36 Am. St. Rep. 927.
20. *Barron v. Collenbaugh*, 114 Ia. 71, 86 N. W. R. 53 (not to re-engage in livery business); *Young v. Cureton*, 87 Ala. 727, 6 So. R. 352; *Steinbauer v. Stone*, 85 Minn. 274, 88 N. W. R. 754.
21. *Parish v. Baird*, 160 N. Y. 302, 54 N. E. R. 724; *St. Louis, etc., Ry. Co. v. Hall*, 71 Ark. 302, 74 S. W. R. 293 (damage by fire).
22. *Wilcox v. Leake*, 11 La. Ann. 178; *Illinois Cent. Ry. Co. v. Smith*, 110 Ky. 203, 61 S. W. R. 2; *Sixth Ave. Ry. Co. v. Elev. Ry. Co.*, 138 N. Y. 548, 34 N. E. R. 400.
23. *Spear v. Drainage Commissioners*, 113 Ill. 632; *Lee v. Water Co.*, 176 Pa. St. 223, 35 Atl. R. 184; *Swan v. Co. of Middlesex*, 101 Mass. 173.

ness should be allowed to state the amount of the damages sustained. Many courts sustain this view.²⁴ But where additional matters involving the question of damages enter into the verdict the witness is not allowed to state the amount of the damages sustained. He is required to state the values under the different conditions.²⁵ The foregoing principles are also applicable in actions for damages caused by nuisances;²⁶ waste;²⁷ encumbrances,²⁸ etc.

It has been held that opinion testimony is admissible as to the damages sustained for breach of promise to marry.²⁹ This view, however, is not in harmony with the general rule. Generally, opinion testimony as to the damages sustained for breach of contract is inadmissible.³⁰

24. *Pike v. Chicago*, 155 Ill. 656, 40 N. E. R. 567; *Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. R. 1; *Blaney v. Salem*, 160 Mass. 303, 35 N. E. R. 858; *Cedar Rapids, etc., Ry. Co. v. Ryan*, 36 Minn. 546, 33 N. W. R. 35; *Siskiyou Co. v. Gamlich*, 110 Cal. 94, 42 Pac. R. 468; *Jenkins v. Charleston St. Ry. Co.*, 58 S. C. 373, 36 S. E. R. 703.

25. *Leroy, etc., Ry. Co. v. Ross*, 40 Kan. 598, 20 Pac. R. 197, 2 L. R. A. 217; *Abbott v. So. Pac. Ry. Co.*, 109 Cal. 282, 41 Pac. R. 1090.

26. *Vandine v. Burpee*, 13 Metc. (Mass.) 288, 46 Am. Dec. 733 (Vegetation injured by smoke from brick-kilns); *Kearney v. Farrell*, 28 Conn. 317, 73 Am. Dec. 677 (odors); *Hargraves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121 (overflow).

27. *Ferguson v. Stafford*, 33 Ind. 162.

28. *Wetherbee v. Bennett*, 2 Allen (Mass.) 428.

29. *Jones v. Fuller*, 19 S. C. 66, 45 Am. Rep. 761.

30. Cases cited in foot-note 20.

In the case cited in foot-note 29 the court says, "The witnesses whose testimony was objected to were not strangers who were called upon to express an abstract opinion as to the amount of damages which a lady would sustain by the breach of promise of marriage, but they were intimate acquaintances, who knew well the social position of the plaintiff, her temperament and disposition, and all her surroundings, and from the knowledge thus acquired they formed their estimate of the damages which she sustained. It is difficult to conceive how it would have been possible for these witnesses to state all the various facts, or reproduce in language the condition of things, upon which they based their estimates, so as to make the same palpable to the minds of the jury. How could they express in language the degree of sensibility of the lady, or the numerous other impalpable things which went to make up their estimate of the amount of damages which she had sustained.?"

§ 16. **Rule where the issue of negligence is involved.**—As a general rule, opinion testimony as to whether certain acts were done negligently or not is inadmissible.³¹ This is because the

31. *Insley v. Shire*, 54 Kan. 793, 39 Pac. R. 713, 45 Am. St. Rep. 308; *Whitman v. Boston Elev. Ry. Co.*, 181 Mass. 138, 63 N. E. R. 334; *Gavish v. Pac. Ry. Co.*, 49 Mo. 274, 277 (In this case the court says, "To have permitted this question would have been to take the case from the jury and submit it to the witness."); *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. R. 732.

jury are, as a rule, as capable of determining the matter as the witness. Thus, where the issue involved the element of safety of a sidewalk;³² bridge;³³ track;³⁴ road;³⁵ etc., opinion testimony was held inadmissible. The rule is also applicable where the issue involves carefulness of conduct. Thus, opinion testimony has been held inadmissible to show that a person's conduct was negligent;³⁶ safe;³⁷ reasonable;³⁸ skilful;³⁹ prudent;⁴⁰ proper;⁴¹ etc.

32. *Lindley v. Detroit*, 131 Mich. 8, 90 N. W. R. 665; *Chicago v. McGiven*, 78 Ill. 347.
33. *Shelley v. Austin*, 74 Tex. 608, 12 S. W. R. 753; *Murray v. Woodsen County*, 58 Kan. 1, 48 Pac. R. 554.
34. *Street Ry. Co. v. Nolthenius*, 40 Ohio St. 376.
35. *Harris v. Clinton Tp.*, 64 Mich. 447, 31 N. W. R. 425, 8 Am. St. Rep. 842.
36. *Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551, 11 S. Ct. 653, 35 L. ed. 270; *Gilmore v. Mittineague Paper Co.*, 169 Mass. 471, 48 N. E. R. 623; *Schneider v. Second Ave. Ry. Co.*, 133 N. Y. 583, 30 N. E. R. 752.
37. *Noble v. St. Joseph, etc., Ry. Co.*, 98 Mich. 249, 57 N. W. R. 126.
38. *Smith v. Mason*, 1 Ont. L. Rep. 594; *Eureka Co. v. Bass*, 81 Ala. 200, 8 So. R. 216, 6 Am. Rep. 152.
39. *Woecker v. Erie Elec. Motor Co.*, 187 Pa. St. 206, 41 Atl. R. 28 (motorman); *Hoerner v. Koch*, 84 Ill. 408 (malpractice).
40. *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Redfield v. Oakland Consol. St. Ry. Co.*, 112 Cal. 220, 43 Pac. R. 1117; *Waupaca Elec. Light, etc., Ry. Co. v. Milwaukee Elec. Ry. etc., Co.*, 112 Wis. 469, 88 N. W. R. 308.
41. *Brush Elec. Light, etc., Co. v. Wells*, 103 Ga. 512, 30 S. E. R. 533; *Springfield v. Coe*, 166 Ill. 22, 46 N. E. R. 709; *Atchison, etc., Ry. Co. v. Chance*, 57 Kan. 40, 45 Pac. R. 60.

§ 17. **Opinion testimony of medical experts.**—Practicing physicians and surgeons are competent witnesses to give expert testimony upon matters connected with their profession. It is not essential that they be graduates of a medical college, or have a license to practice from a medical board, unless a statute so prescribes.⁴² Since medicine is not an exact science, the particular system of medicine practiced is immaterial. "The popular axiom, that doctors differ, is as true now as it ever was, and as long as it continues to be so, it is impossible for the law to recognize any class of practitioners, or the followers of any particular system or method of treatment, as exclusively entitled to be regarded as doctors."⁴³ Ordinarily, a general practitioner is a competent expert witness.⁴⁴ Moreover, a Christian Scientist doctor, who formerly practiced medicine, has been held a competent expert witness.⁴⁵

§ 18. **Scope of expert medical testimony.**—The scope of expert medical testimony is a wide one. Thus, a medical expert may give opinion testimony to show a person's physical condition,⁴⁶ the effect of using a given drug;⁴⁷ the

42. *State v. Speaks*, 94 N. C. 865, 874.

43. *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.) 1.

44. *Hastings v. Rider*, 99 Mass. 622; *State v. Reddick*, 7 Kan. 143; *Kelly v. United States*, 27 Fed. R. 616.

45. *Stone v. Moore*, 83 Ia. 186.

46. *Stone v. Moore*, *supra*; *Meyers v. State*, 84 Ala. 11; *Spear v. Hiles*, 67 Wis. 367.

cause of death of a given person;⁴⁸ the effect upon the body or mind of a given disease, or of particular injuries;⁴⁹ whether certain wounds would probably prove fatal;⁵⁰ that a still-born child could have been born alive if medical treatment had been given in time;⁵¹ that death was caused by drowning;⁵² that deceased was dead before a given train ran over the body;⁵³ the probability of recovery from the effects of given injuries;⁵⁴ the ordinary duration of a given disease,⁵⁵ and the effects of it upon the general health;⁵⁶ whether deceased was pregnant at the time of her death;⁵⁷ whether insanity is feigned or real;⁵⁸ whether a person feels pain in an imaginary limb;⁵⁹ whether a boy of a given age could

47. *Batten v. State*, 80 Ind. 394; *Hoard v. Peck*, 56 Barb. (N. Y.) 202, 210.
48. *Schneider v. Manning*, 121 Ill. 376; *State v. Baptiste*, 26 La. Ann. 134, 137; *Pitts v. State*, 43 Miss. 472; *Boyle v. State*, 61 Wis. 440; *People v. Barker*, 60 Mich. 277.
49. *Hardiman v. Brown*, 162 Mass. 585; *Young v. Johnson*, 123 N. Y. 226; *Reed v. City of Madison*, 85 Wis. 667.
50. *Ill. Cent. Ry. Co. v. Latimer*, 128 Ill. 163; *Stouter v. Manhattan Ry. Co.*, 127 N. Y. 661.
51. *Tel. Co. v. Cooper*, 71 Tex. 507.
52. *People v. Barker*, *supra*.
53. *State v. Clark*, 15 S. C. (N. S.) 403.
54. *Springfield Ry. Co. v. Welsh*, 155 Ill. 511; *McClain v. Brooklyn City Ry. Co.*, 116 N. Y. 459.
55. *Linton v. Hurley*, 14 Gray (Mass.) 191.
56. *Pidcock v. Potter*, 68 Pa. St. 342, 344.
57. *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578.
58. *State v. Hayden*, 51 Vt. 296.
59. *Hickenbotham v. Del. Ry. Co.*, 122 N. Y. 91.

beget a child;⁶⁰ whether a given disease is contagious;⁶¹ whether a given injury is permanent;⁶² whether a patient suffers pain;⁶³ that a person's ill-health resulted from a given injury;⁶⁴ that a given wound was inflicted before or after death;⁶⁵ whether a person's arm has ever been broken;⁶⁶ etc.

§ 19. Opinion testimony of blood stains.—

Where the question in issue is whether certain stains are blood stains or not, opinion testimony, both expert and non-expert, is admissible. That given by an expert would naturally be entitled to more weight than that given by a non-expert. But both classes of testimony are admissible. As said in a New York case, "The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence; and though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal."⁶⁷ On the other hand, where the question is whether the blood is *human* blood or not, only expert testimony is admissible.⁶⁸

60. *Johnson v. Castle*, 63 Vt. 452.

61. *Moore v. State*, 17 Ohio St. 521, 526.

62. *City of Goshen v. England*, 119 Ind. 368.

63. *Chicago, etc., Ry. Co. v.* 112 Ill. 16.

64. *Louisville, etc., Ry. Co. v. Shires*, 108 Ill. 617.

65. *Ewell's Med. Journal* 31.

66. *Johnson v. Cent. Ry. Co.*, 56 Vt. 708.

67. *People v. Deacons*, 109 N. Y. 374.

68. *People v. Gauzlez*, 35 N. Y. 49, 61.

§ 20. **Expert opinion testimony in malpractice cases.**—Expert opinion testimony is admissible in malpractice cases. Thus a medical expert may state his opinion as to whether certain treatment taken as a whole, was proper or improper;⁶⁹ whether there was any unskilful management on the part of the defendant;⁷⁰ whether the plaintiff's limb was as good as the average when treated by skilful physicians in such cases;⁷¹ whether subsequent treatment of the patient was proper or not,⁷² etc.

§ 21. **Expert opinion testimony on the trades and arts.**—Expert opinion testimony may be given by tradesmen as well as by men of science. Thus, this class of testimony may be given by mechanics, machinists, masons, painters, photographers, millers, cattlemen, lumbermen, gardeners, farmers, etc.⁷³ It may also be given by insurance men, railroad men, nautical men, surveyors, civil engineers, electrical engineers, etc.

§ 22. **Expert opinion of mechanics and machinists.**—Expert opinion testimony of mechanics and machinists has been held admissible as to whether certain work was well done or not;⁷⁴ as to the time necessary to do certain work;⁷⁵ as to

69. *Mayo v. Wright*, 63 Mich. 32.

70. *Olmstead v. Gere*, 100 Pa. St. 127.

71. *Olmstead v. Gere*, *supra*.

72. *Wright v. Hardy*.

73. *Curtis v. Gano*, 26 N. Y. 426.

74. *Ward v. Kilpatrick*, 85 N. Y. 413.

75. *Roberts v. Boston*, 149 Mass. 346; *Hough v. Cook*, 69 Ill. 581.

the injury to a house caused by defects in the construction of the cellar;⁷⁶ as to the safety of a given machine;⁷⁷ as to the quality of the iron in a coupling pin;⁷⁸ as to the effect of a knot or crossgrain in diminishing the strength of a given piece of timber;⁷⁹ as to the best mode in which to construct electric lights;⁸⁰ as to the relative strength of wrought and cast iron in machinery;⁸¹ as to the relative strength of wood and iron;⁸² as to the relative strength of different kinds of wood;⁸³ as to the proper mode of conducting certain mechanical operations;⁸⁴ as to the operation and results of given mechanical devices;⁸⁵ as to the result of bolts loosening, and other specific defects in machinery;⁸⁶ as to the

76. *Moulton v. McOwen*, 103 Mass. 587.

77. *Lang v. Terry*, 163 Mass. 138; *Lau v. Fletcher*, 104 Mich. 295, 62 N. W. R. 357.

78. *Boettger v. Scerpe Iron Co.*, 124 Mo. 87.

79. *Kershaw v. Wright*, 115 Mass. 361; *Boettger v. Scherpe, etc., Iron Co.*, 124 Mo. 87, 27 S. W. R. 466.

80. *Excelsior Elec. Co. v. Sweet*, 57 N. J. L. 224, 30 Atl. 553.

81. *McFaul v. Madera Flume, etc., Co.*, 134 Cal. 313, 66 Pac. R. 308.

82. *Caven v. Bodwell Granite Co.*, 97 Me. 381, 54 Atl. R. 851.

83. *Boettger v. Scherpe, etc., Iron Co.*, *supra*.

84. *Leslie v. Granite Ry. Co.*, 172 Mass. 468, 52 N. E. R. 542 (mode of having derrick in handling heavy stones); *Fritz v. West. Union Tel. Co.*, 25 Utah 263, 71 Pac. R. 209 (stringing telephone wires); *Partlett v. Dunn*, 102 Va. 459, 46 S. E. R. 467 (constructing hoisting apparatus).

85. *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. R. 257 (burr and roller mills).

86. *Slack v. Harris*, 200 Ill. 96, 65 N. E. R. 669.

sufficiency of given mechanical devices;⁸⁷ as to the comparative merits of different machines;⁸⁸ as to the proper mode of constructing buildings;⁸⁹ as to the amount of work a given force of men could do,⁹⁰ etc.

§ 23. **Expert opinion of masons.**—Expert opinion testimony of masons has been held admissible as to the mode of measuring masonry;⁹¹ as to how much sand was used in making a given quantity of mortar;⁹² as to the time necessary for walls to dry in order that the house would be habitable;⁹³ as to whether a given quantity of rain was sufficient to wash down a certain wall,⁹⁴ etc.

§ 24. **Expert opinion of artists in painting and photography.**—An artist in painting is a competent witness to give expert opinion testimony as to the genuineness of a painting,⁹⁵ etc. And an artist in photography is a competent witness to give expert opinion testimony as to the merits of given photographs,⁹⁶ etc.

87. *Lang v. Terry*, *supra*; *Stomme v. Hanford Produce Co.*, 108 Ia. 137, 78 N. W. R. 841.

88. *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. Rep. 515.

89. *Prendible v. Con. Mfg. Co.*, 160 Mass. 131; *Haver v. Tenney*, 36 Ia. 80.

90. *Allen v. Murray*, 87 Wis. 41.

91. *Schulte v. Hennessey*, 40 Ia. 352.

92. *Miller v. Shay*, 142 Mass. 598.

93. *Smith v. Gugerty*, 4 Barb. (N. Y.) 619.

94. *Montgomery v. Gilmer*, 33 Ala. 116.

95. *Folkes v. Chadd*, 4 Doug. (King's Bench) 157.

96. *Barnes v. Ingalls*, 39 Ala. 193.

§ 25. **Expert opinion of millers and mill-wrights.**—Millers and mill-wrights are competent to give expert opinion evidence pertaining to matters connected with their experience.⁹⁷ Thus, a miller has been held a competent witness to give opinion evidence that the operation of a given mill was injuriously effected by a certain dam below it backing up the water;⁹⁸ that certain wheat found in defendant's possession was wheat that he himself grew and which originally was in his possession;⁹⁹ that a given mill was capable of grinding a certain amount of wheat,¹⁰⁰ etc.

And a mill-wright has been held competent to give expert opinion evidence as to the fitness of a certain location for a mill site;¹ that the lowering of given mill dam a foot would render the mill incapable of grinding wheat properly;² as to the fitness of another person as a mill-wright,³ etc.

§ 26. **Expert opinion of cattlemen.**—Persons who have had large experience in raising and handling stock have been held competent to give opinion evidence as to the weight of cattle;⁴

97. *Hammond v. Woodman*, 41 Me. 177.

98. *Ball v. Hardesty*, 38 Kan. 540.

99. *Walker v. State*, 58 Ala. 393.

100. *Read v. Barker*, 30 N. J. Law 378, 32 *Ib.* 477.

1. *Haas v. Choussard*, 17 Tex. 592.

2. *Detweiler v. Groff*, 10 Pa. St. 376.

3. *Doster v. Brown*, 25 Ga. 24.

4. *Carpenter v. Wait*, 11 Cush. (Mass.) 257.

as to their condition, etc.;⁵ as to the age of the animals;⁶ as to the number of hogs that could safely be shipped in a car in hot weather,⁷ etc.

§ 27. **Expert opinion of lumbermen.**—An experienced lumberman is deemed qualified to give expert opinion evidence. "In a substantial sense he may be regarded as an expert having peculiar knowledge and skill which renders his opinion worthy of consideration as the ground of judgment and opinion in others who have not such knowledge and skill."⁸ Thus, opinion evidence of lumberman has been held admissible as to the proper mode of floating logs;⁹ as to the proper mode of mooring a raft;¹⁰ as to the quality of certain lumber;¹¹ as to the number of logs a given force of men could deliver in a day,¹² etc.

§ 28. **Expert testimony of gardeners and farmers.**—Persons experienced in agriculture are competent to give expert testimony. Thus, their opinions have been held admissible as to soil fertility;¹³ as to the average yield of crops;¹⁴

5. Baltimore, etc., Ry. Co. v. Thompson, 10 Md. 76.

6. Moreland v. Mitchell County, 40 Ia. 401; Clagne v. Hodgson, 16 Minn. 329.

7. Wabash, etc., Ry. Co. v. Pratt, 15 Bradw. (Ill.) 177.

8. Dean v. McLean, 48 Vt. 412.

9. Dean v. McLean, *supra*.

10. Hayward v. Knapp, 23 Minn. 430.

11. Moore v. Lea's Administrator, 32 Ala. 375.

12. Salvo v. Duncan, 49 Wis. 157.

13. Cornell v. Dean, 105 Mass. 435; Finch v. Chicago, M. & St. P. Ry. Co., 46 Minn. 250.

14. Farmers,' etc., Bank v. Woodell, 38 Ore. 294, 61 Pac. R. 837, 65 Pac. 520.

as to the effect of a fire on farm land;¹⁵ as to the proper time to perform given operations on the farm;¹⁶ as to the wisdom of draining certain land;¹⁷ as to the sufficiency of a given fence;¹⁸ as to the width land should be ploughed to stop fire;¹⁹ as to the probable effect of setting fires under given conditions;²⁰ as to whether a cow was diseased;²¹ as to the damage to a garden and nursery caused by smoke from a brick kiln;²² as to the cost of clearing land;²³ as to the fact that a horse had blind staggers;²⁴ as to the proper modes of cultivation;²⁵ as to the yield of a given crop;²⁶ as to the value of certain land;²⁷ as to the adulteration of milk;²⁸ as to the amount of corn

15. Penn. Co. v. Hunsley, 23 Ind. App. 37, 54 N. E. R. 1071.

16. Farmers,' etc., Bank v. Woodell, *supra*.

17. Buffum v. Harris, 5 R. I. 243.

18. Louisville, etc., Ry. Co. v. Spain, 61 Ind. 460.

19. Krippner v. Bieble, 28 Minn. 139.

20. Wells v. Eastman, 61 N. H. 507 (burning brush during a high wind); Krippner v. Bieble, *supra* (burning stubble during dry spell); Higgins v. Dewey, 108 Mass. 494, 9 Am. Rep. 63 (farmer's opinion held inadmissible as to liability of fire spreading to adjoining land).

21. Slater v. Wilcox, 57 Barb. (N. Y.) 604.

22. Vandine v. Burpee, 13 Metc. (Mass.) 288.

23. Boyer v. Ry. Co., 123 Ia. 248, 9 N. W. R. 764.

24. People v. Vane, 88 Mich. 453, 50 N. W. R. 324.

25. Buffum v. Harris, *supra*; Spiva v. Stapleton, 38 Ala. 171.

26. Isaac v. McLean, 106 Mich. 79, 64 N. W. R. 2; McLennan v. Lemen, 57 Minn. 317.

27. Finch v. Chicago, M. & St. P. Ry. Co., 46 Minn. 250.

28. Lane v. Wilcox, 55 Barb. (N. Y.) 615.

a field would have produced had certain cattle not have trespassed on it,²⁹ etc.

§ 29. **Expert opinion of insurance men.**—Experts in insurance matters are competent to give expert opinion evidence. There is much conflict in the decisions, however, as to the admissibility of this class of testimony. But it has been received as to the materiality of certain concealed facts;³⁰ as to the effect of making certain changes pertaining to the building insured as effecting the risk;³¹ as to the fact that the risk is increased by the building becoming vacant;³² as to whether certain facts, had they been known, would have affected the amount of the premium;³³ as to the seaworthiness of a vessel;³⁴

29. *Sickles v. Gould*, 51 How. Pr. (N. Y.) 25; *Keith v. Tilford*, 12 Neb. 271, 275.
30. *Richards v. Murdock*, 10 B. & C. 537; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; *Cornish v. Farm Bldg. Fire Ins. Co.*, 74 N. Y. 295; *Stemett v. Pa. Fire Ins. Co.*, 68 Ia. 674, 676; *Kern v. South St. Louis Mut. Ins. Co.*, 4 Mo. 19.
31. *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. R. 255; *Daniels v. Hudson River Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192.
32. *Franklin Ins. Co. v. Gruver*, 100 Pa. St. 266 *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Luce v. Dorchester Ins. Co.*, 105 Mass. 300, 7 Am. Rep. 522. *Contra*, *Southern Mut. Ins. Co. v. Hudson*, 115 Ga. 638, 42 S. E. R. 60.
33. *Hobby v. Dana*, 17 Barb. (N. Y.) 111; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 244. *Meriram v. Middlesex Ins. Co.*, 21 Pick. (Mass.) 162.
34. *Thornton v. Royal Exchange Ass'n Co.*, Peake N. P. 26.

as to the present value of a policy which involves intricate computation,³⁵ etc.

§ 30. **Expert opinion of railroad men.**—Experienced railroad men, whether in the passenger,³⁶ freight,³⁷ or track³⁸ departments, are competent to give expert opinion evidence. This class of testimony has been received as to the effect of a leaky throttle valve in operating a locomotive;³⁸ as to the duties of engineers, brakemen and other railroad employes;³⁹ as to the distance within which a train could be stopped;⁴⁰ as to the size and effect of sparks emitted from a railroad engine;⁴¹ as to the practical operation of trains;⁴² as to whether certain operations are safe;⁴³ as to the safety of an en-

35. *Price v. Conn. Life Ins. Co.*, 48 Mo. App. 281.

36. *Union Pac. Ry. Co. v. Novak*, 61 Fed. R. 573, 9 C. C. A. 629 (engineer).

37. *Price v. Richmond, etc., Ry. Co.*, 38 S. C. 199, 17 S. E. R. 732.

38. *Brabbitts v. Chicago, etc., Ry. Co.*, 38 Wis. 289.

39. *Culver v. Alabama Midland Ry. Co.*, 108 Ala. 330, 18 So. R. 827; *Quinlan v. Chicago, etc., Ry. Co.*, 113 Ia. 89, 84 N. W. R. 960; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. R. 514, 2 Am. St. Rep. 631.

40. *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572 (conductor; *Maher v. Atl. & P. Ry. Co.*, 64 Mo. 267 (engineer)).

41. *Davidson v. St. Paul, etc., Ry. Co.*, 34 Minn. 51.

42. *Prosser v. Mont. Cent. Ry. Co.*, 17 Mont. 372, 43 Pac. R. 81, 30 L. R. A. 814.

43. *Chicago, etc., Ry. Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. R. 640 (running train backward); *Louisville, etc., Ry. Co. v. Scott*, 108 Ky. 392, 56 S. W. R. 674, 22 Ky. L. Rep. 30, 50 L. R. A. 381 (coach in front of engine).

gine boiler;⁴⁴ as to whether a train in striking a man standing on the track would run over him or throw him off the track;⁴⁵ as to the cause of a train leaving the track;⁴⁶ as to the probability of sparks from the engine starting fires;⁴⁷ as to safe appliances concerning engines,⁴⁸ or tracks;⁴⁹ as to the means used in stopping a train;⁵⁰ as to the speed of a train at the time of an accident;⁵¹ as to what course the carrier might properly pursue when a carload of stock was in great distress owing to the heat;⁵² as to the effect of running a car over a switch improperly set;⁵³ as to the danger in riding on the edge of cars;⁵⁴ as to the comparative danger involved in using blocked and unblocked switches;⁵⁵ as to whether

44. Chicago, etc., Ry. Co. v. Shannon, 43 Ill. 339.

45. Gulf, etc., Ry. Co. v. Mathews, 28 Tex. Civ. App. 92, 66 S. W. R. 588; 67 S. W. R. 788.

46. Brownfield v. Ry. Co., 107 Ia. 254, 77 N. W. R. 1038; Seaver v. Boston Ry. Co., 14 Gray (Mass.) 466.

47. Czezewzka v. Benton B. Ry. Co., 121 Mo. 201, 25 S. W. R. 911; Cincinnati Ry. Co. v. Smith, 22 Ohio St. 246.

48. Chicago Ry. Co. v. Shannon, *supra*.

49. German Ins. Co. v. Ry. Co., 128 Ia. 386, 104 N. W. R. 361; St. Louis & S. F. Ry. Co. v. Farr, 56 Fed. R. 994.

50. Mobile, etc., Ry. Co. v. Blakely, 59 Ala. 471.

51. Louisville, etc., Ry. Co. v. Shires, 108 Ill. 617.

52. Lindsley v. Chicago, etc., Ry. Co., 36 Minn. 540.

53. Louisville, etc., Ry. Co. v. Mothershed, 97 Ala. 261, 12 So. 714.

54. Schlaff v. Louisville, etc., Ry. Co., 100 Ala. 377, 14 So. R. 105.

55. Galveston, etc., Ry. Co. v. Hughes, 22 Tex. Civ. App. 134, 54 S. W. R. 264.

one brakeman could stop a given train;⁵⁶ as to the comparative danger involved in different modes of performing work;⁵⁷ as to the comparative danger involved in running a train forward and in running it backward;⁵⁸ as to whether given acts are essential;⁵⁹ as to whether a one-armed brakeman could do the work as efficiently as one having two arms;⁶⁰ as to whether it would be possible under given conditions to stop a train;⁶¹ as to whether it would be possible for sparks of a given size to be emitted from a locomotive equipped with a suitable spark-arrester;⁶² as to the comparative danger in using different devices for the same purpose;⁶³ as to the distance within which a train could be stopped in going down hill,⁶⁴ etc.

Persons skilled in operating street railways are competent to give expert opinion evidence. And where the operations are similar, persons

56. *Union Pac. Ry. Co. v. Novak*, 61 Fed. R. 573, 9 C. C. A. 629.

57. *Schlaff v. Louisville, etc., Ry. Co.*, 100 Ala. 377, 14 S. R. 105.

58. *Kuhns v. Wisconsin Ry. Co.*, 71 Ia. 561.

59. *Louisville, etc., Ry. Co. v. Illinois Cent. Ry. Co.*, 174 Ill. 448, 51 N. E. R. 824 (switchmen and signals).

60. *Richmond, etc., Ry. Co. v. Greenwood*, 99 Ala. 501, 14 So. R. 495.

61. *Alabama Gt. So. Ry. Co. v. Linn*, 103 Ala. 134, 15 So. R. 508; *Eckert v. St. Louis, etc., Ry. Co.*, 13 Mo. App. 352.

62. *Frace v. New York, etc., Ry. Co.*, 68 Hun (N. Y.) 325, 12 N. Y. Suppl. 958.

63. *Galveston, etc., Ry. Co. v. Hughes*, *supra*.

64. *Maher v. Atl., etc., Ry. Co.*, 64 Mo. 267.

skilled in operating steam railroads are competent to give expert opinion evidence concerning matters affecting street railways.⁶⁵ Expert opinion evidence of persons skilled in operating street railways has been admitted as to the value of given appliances for street-railway purposes;⁶⁶ as to the distance within which a car could be stopped;⁶⁷ as to the duties of various employes;⁶⁸ as to the proper management of an electric car,⁶⁹ etc.

§ 31. **Expert opinion of nautical men.**—Nautical men of experience are competent to give expert opinion evidence. "Such men form their opinions from facts within their own experience, and not from theory or abstract reasoning. They come, therefore, even more properly within the definition of experts than men of mere science."⁷⁰ Expert opinion testimony of nautical men has been received as to how far a light can

65. *Atlantic R., etc., Co. v. Monk*, 118 Ga. 449, 45 S. E. R. 494 (effect of curves on speed).

66. *Ashatabula Rapid Transit Co. v. Dagenback*, 11 Ohio Cir. Dec. 307 (life-guards).

67. *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. R. 284.

68. *Czewzka v. Benton-Belfontaine Ry. Co.*, 121 Mo. 201, 25 S. W. R. 911 (as to where driver ought to stand).

69. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. R. 379, 37 L. R. A. 533.

70. *Delaware, etc., Steam Towboat Co. v. Starrs*, 69 Pa. St. 36, 41. See also, *Clark v. Locomotive Works*, 32 Mich. 350.

be seen;⁷¹ as to the proper management of boats;⁷² as to the seaworthiness of vessels;⁷³ as to the feasibility of raising a sunken vessel;⁷⁴ as to the size of waves;⁷⁵ as to the probable cause of loss of a vessel;⁷⁶ as to usages of navigation;⁷⁷ as to the cause of a vessel leaking;⁷⁸ as to what goods are classed as inflammable;⁷⁹ as to prudence in operating a tugboat;⁸⁰ as to the direction from which the blow came in the case of a collision;⁸¹ as to what constitutes a full cargo to carry with safety;⁸² as to whether an injured boat is worth repairing;⁸³ as to the proper mode of storing a cargo;⁸⁴ as to the possibility of a ship striking an obstacle without

71. *Case v. Perew*, 46 Hun (N. Y.) 57.

72. *Union Ins. Co. v. Smith*, 124 U. S. 405; *Guiterman v. Liverpool Steamship Co.*, 83 N. Y. 358.

73. *Western Ins. Co. v. Tobin*, 32 Ohio St. 77, 94; *Baird v. Daly*, 68 N. Y. 548; *Perkins v. Augusta Ins. Co.*, 10 Gray 312.

74. *McLanahan v. Univ. Ins. Co.*, 1 Peters (U. S.) 170.

75. *Smith v. Sabine Ry. Co.*, 76 Tex. 63.

76. *Steamboat Clipper v. Logan*, 18 Ohio 375; *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319, 322.

77. *The Alaska*, 33 Fed. R. 107.

78. *Parsons v. Manuf., etc., Ins. Co.*, 16 Gray (Mass.) 463.

79. *A. J. Tower Co. v. S. Pac. Co.*, 184 Mass. 472, 69 N. E. R. 348 (oil clothes).

80. *Transportation Line v. Hope*, 95 U. S. 297; *Delaware, etc., Steam Towboat Co.*, *supra*.

81. *Steamboat Clipper v. Logan*, *supra*.

82. *Ogden v. Parsons*, 23 How. (U. S.) 167.

83. *Steamboat Clipper v. Logan*, *supra*.

84. *Price v. Powell*, 3 N. Y. 322.

those on board knowing it;⁸⁵ as to the effect of a deck load as regards the safety of the ship,⁸⁶ etc.

§ 32. **Expert opinion of surveyors and engineers.**—Surveyors and civil and electrical engineers are competent to give expert opinion evidence. Thus, surveyors may give opinion evidence as to the location of the boundary line between tracts of land;⁸⁷ as to the correctness of a plat;⁸⁸ as to the location of a county boundary line which had not been officially located;⁸⁹ as to whether an alleged corner of a quarter section is the true one;⁹⁰ as to the location of a given survey;⁹¹ as to whether alleged survey marks or monuments are genuine,⁹² etc. On the other hand, opinion testimony of a surveyor is not admissible as to the controlling calls in the description of a deed,⁹³ or the proper location of a grant.⁹⁴ The construction of a document is a question for the court to decide. “Ex-

85. *Louisville Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. R. 563.

86. *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1.

87. *Mincke v. Skinner*, 44 Mo. 92; *Shook v. Pate*, 50 Ala. 91; *Messer v. Reginnetter*, 32 Ia. 312.

88. *Messer v. Reginnetter*, *supra*.

89. *Kinley v. Crane*, 34 Pa. St. 146.

90. *Toomy v. Kay*, 62 Wis. 104.

91. *Jackson v. Lambert*, 121 Pa. St. 182.

92. *Knox v. Clark*, 12 Mass. 216; *McGarr v. Hamilton*, 58 Conn. 69.

93. *Whittlesey v. Kellog*, 28 Mo. 404; *Randolph v. Adams*, 2 W. Va. 519.

94. *Schultz v. Lindell*, 30 Mo. 310; *Norment v. Fastnacht*, 1 MacArth. (D. C.) 515.

perts cannot be called to give their opinions on a subject of this character. Witnesses are competent to show lines and measurements, but the construction of written instruments is for the court alone."⁹⁵

Opinion testimony of a civil engineer, pertaining to matters which are connected with his profession, and which are legally relevant, is admissible. Thus, such testimony is admissible as to the proper mode of doing certain engineering work;⁹⁶ as to the proper grade of a railroad;⁹⁷ as to the construction and safety of a bridge;⁹⁸ as to the soundness of timbers in bridges;⁹⁹ as to whether certain drains diminish the water in a fountain;¹⁰⁰ as to what effect the constructing of a mill-dam would have upon the channel of the stream;¹ as to whether a certain bank was the cause of a harbor becoming choked;² as to whether a lake would probably overflow a certain area;³ as to the quantity of stone in a wall;⁴

95. *Norment v. Fastnacht*, *supra*.

96. *Clark v. Babcock*, 23 Mich. 164 (boring salt wells); *Stead v. Worcester*, 150 Mass. 241; *Hart v. Hudson R. Bridge Co.*, 84 N. Y. 56.

97. *Scott v. Astoria Ry. Co.*, 43 Oreg. 26, 72 Pac. R. 594, 99 Am. St. Rep. 710, 62 L. R. A. 543.

98. *Hart v. Hudson R. Bridge Co.*, *supra*.

99. *City of Indianapolis v. Scott*, 72 Ind. 196, 203.

100. *Buffum v. Harris*, 5 R. I. 250.

1. *Ball v. Hardesty*, 38 Kan. 540.

2. *Folkes v. Chadd*, 3 Doug. 157, 26 Eng. C. L. 63; *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 396.

3. *Clason v. Milwaukee*, 30 Wis. 316.

4. *Moelering v. Smith*, 7 Ind. App. 451, 34 N. E. R. 675.

as to matters of customary bridge construction;⁵ as to the injury to a harbor by removing sand from the shore,⁶ etc.

Opinion testimony of electrical engineers is admissible as to matters which come within the scope of their profession. Thus, they may give opinion testimony as to the proper height at which electric wires should be strung across highways;⁷ as to whether a person under given circumstances would be subjected to an electric shock,⁸ etc.

And opinion testimony of miners, pertaining to the operation of mines, is also admissible. Thus, they may give opinion testimony as to the proper mode of operating a mine;⁹ as to the timbering of a mine;¹⁰ as to the support of a mine,¹¹ etc.

§ 33. Expert opinion of chemists.—An experienced chemist may give opinion testimony as to physiological and chemical matters that are leg-

5. *Hart v. Hudson R. Bridge Co.*, 84 N. Y. 56.

6. *Clason v. Milwaukee*, *supra*.

7. *Houston, etc. Ry. Co. v. Hopson*, Tex. C. W. App. , 67 S. W. R. 458.

8. *Ludwig v. Metropolitan St. Ry. Co.*, 71 N. Y. App. Div. 210, 75 N. Y. Suppl. 667.

9. *McNamara v. Logan*, 100 Ala. 187.

10. *Bird v. Utica Gold Mining Co.*, 2 Cal. App. 674, 84 Pac. R. 256.

11. *Grant v. Varney*, 21 Colo. 329, 40 Pac. R. 771; *Monohan v. Kansas City Clay Co.*, 58 Mo. App. 68.

ally relevant.¹² Thus, he may give opinion evidence as to the comparative size of human blood corpuscles;¹³ as to the chemical properties of various gases;¹⁴ as to the feasibility of removing writing by the use of chemicals without discoloring the paper;¹⁵ as to the effect of a given poison on the human system;¹⁶ as to the ingredients of a given mixture;¹⁷ as to whether a given blood stain was made by human blood;¹⁸ as to the safety of camphene lamps;¹⁹ as to whether a given fertilizer is merchantable and suitable for the purpose intended;²⁰ whether a blood stain on a garment worn by the victim was caused by blood flowing from without or within;²¹ and whether it flowed upwards or downwards;²² as to whether certain hair is human hair;²³ as to

12. *People v. Dole*, 122 Cal. 486, 55 Pac. R. 581, 68 Am. St. Rep. 50; *State v. Knight*, 43 Me. 11; *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. R. 53.

13. *State v. Knight*, *supra*.

14. *St. Louis Gaslight Co. v. Philadelphia Amer. Fire Ins. Co.*, 33 Mo. App. 348.

15. *Birmingham Nat. Bank v. Bradley*, *supra*.

16. *State v. Cook*, 17 Kan. 392.

17. *Com. v. Kendrick*, 147 Mass. 444; *State v. Slagh*, 83 N. C. 630 (chemical analysis not always essential).

18. *Com. v. Sturtivant*, 117 Mass. 122, 124; *Knoll v. State*, 55 Wis. 249; *State v. Knight*, 43 Me. 1, 133.

19. *Bierce v. Stocking*, 11 Gray (Mass.) 174.

20. *Wilcox v. Hall*, 53 Ga. 635.

21. *State v. Knight*, *supra*.

22. *Com. v. Sturtivant*, *supra*.

23. *Com. v. Dorsey*, 103 Mass. 412 (A witness not specially qualified also competent).

the constituent elements of a given compound;²⁴ as to the probability of spirits evaporating under given conditions;²⁵ as to the species of given animal fur,²⁶ etc. In the reference given in footnote 26 Mr. Richardson gives an interesting account of opinion evidence by a microscopist. In this case the mother of a nine-year-old girl was charged with murdering her by cutting her throat. A knife, with blood stains and hair on it, was produced and the accused said she had used it in cutting the throat of a rabbit. With no knowledge of the facts of the case, a microscopist who examined the hair pronounced it squirrel's fur. The evidence showed that the little girl, at the time of her murder, wore around her neck a tippet or victorine made of squirrel's fur. Upon this circumstantial evidence the accused was convicted. And subsequently she confessed her guilt.

§ 34. Some miscellaneous illustrations of expert opinion evidence.—A medical expert may give opinion evidence as to the deadly character of a weapon;²⁷ as to whether a certain wound could have been produced by a given weapon;²⁸ as to the direction from which a blow came;²⁹

24. *Allen v. Hunter*, 6 McLean 303, 310.

25. *Turner v. The Black Warrior*, 1 McAlister, 181, 184.

26. *Richardson's Medical Microscopy* 295; *Rogers on Expert Testimony*, p. 146.

27. *Banks v. State*, 13 Tex. App. 182.

28. *State v. Knight*, 43 Me. 1, 130 (a razor); *Batten v. State*,

29. *McKee v. State*, 82 Ala. 32.

as to whether the instrument used was blunt or sharp;³⁰ as to whether the wound was made by a dirk;³¹ as to the serious nature of a disease,³² etc. A chemist and toxicologist, as well as a physician, is competent to give expert opinion evidence as to the effect of taking strychnine into the human stomach.³³ A physician may testify that pregnancy is as likely to result from a case of rape as where the act was voluntary;³⁴ as to the permanency of loss of eyesight;³⁵ as to the condition of a corpse at various times after burial;³⁶ as to the sex of a skeleton,³⁷ etc. A midwife, as well as a physician, may give expert opinion evidence that the birth of a child was premature.³⁸ A surgeon may give expert evidence as to the ligaments that would be severed in a given operation.³⁹ A veterinary may give opinion evidence pertaining to matters within the knowledge of members of his profession.⁴⁰ A medical expert may not, however, give expert opinion

30. *State v. Morphy*, 33 Ia. 272.

31. *Mendum v. Com.* 6 Rand. (Va.) 704.

32. *Linton v. Hurley*, 14 Gray (Mass.) 191.

33. *State v. Cook*, 17 Kan. 392.

34. *State v. Knapp*, 45 N. H. 484, 495. See also *Young v. Johnson*, 46 Hun (N. Y.) 164.

35. *Tinney v. New Jersey Steamboat Co.*, 12 Abb. Pr. (N. S.) 1.

36. *State v. Secrest*, 80 N. C. 450, 453.

37. *Wilson v. State*, 41 Tex. 320, 321.

38. *Mason v. Fuller*, 45 Vt. 29.

39. *Johnson v. Winston* (Neb. 1903), 94 N. W. R. 607.

40. *Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, L. ed. 230.

evidence of the effect of a surgical operation on the *moral* nature.⁴¹

§ 35. **Some miscellaneous illustrations of opinions not admissible.**—As stated in § 13, an opinion which virtually amounts to an expression as to the merits of the case under investigation should be rejected. Moreover, when the facts are such that they can be made palpable in the concrete to the jury; or, in other words, when the jury can virtually stand in the shoes of the witness and see the facts thru his eyes, as it were, opinion testimony is inadmissible.⁴² Thus, for the reasons stated, opinion testimony has been held inadmissible as to whether a given hole was calculated to frighten horses;⁴³ what the result would have been under given circumstances if the driver of a wagon had made a certain turn;⁴⁴ as to the best and safest way of load-

41. *People v. Royal*, 53 Cal. 62 (Indecent liberties).

42. *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519, 21 So. R. 507, 62 Am. St. Rep. 121; *Illinois Steel Co. v. Mann*, 197 Ill. 186, 64 N. E. R. 328; *Green v. State*, 154 Ind. 655, 57 N. E. R. 637; *Frick v. Kabaker*, 116 Ia. 494, 90 N. W. R. 498; *Atchison, etc., Ry. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60; *Welch v. New York, etc., Ry. Co.*, 176 Mass. 393, 57 N. E. R. 668; *Atherton v. Bancroft*, 114 Mich. 241, 72 N. W. R. 208; *Seifred v. Penn. Ry. Co.*, 206 Pa. St. 399, 55 Atl. R. 1061; *Lee v. Knapp*, 155 Mo. 610, 56 S. W. R. 458; *Gardner v. Friederich*, 163 N. Y. 568, 57 N. E. R. 1110.

43. *Smith v. Sherwood Tp.*, 62 Mich. 159, 28 N. W. R. 806.

44. *W. J. Lemp Brewing Co. v. Ort*, 113 Fed. R. 482, 51 C. C. A. 317.

ing car wheels;⁴⁵ as to the extent of moonlight as to the quantity and quality;⁴⁶ as to the probability of a person falling in walking on an uneven floor;⁴⁷ as to the dangerous condition of a place;⁴⁸ as to the possibility that a sewer cover would tip before slipping;⁴⁹ as to the possibility of seeing a pistol alleged to have been concealed;⁵⁰ as to the common characteristics of animals;⁵¹ as to the effect of opening windows in a stable containig horses;⁵² as to the safety of driving between given obstructions;⁵³ as to the effect of intoxication on the health;⁵⁴ as to whether the death of a horse was caused by overdriving;⁵⁵ as to the destructive nature of fire;⁵⁶ as to the bouyancy of water;⁵⁷ as to the deadly nature of a given weapon;⁵⁸ as to whether a bullet hole in a door

45. Southern Ry. Co. v. Mauzy, 98 Va. 692, 37 S. E. R. 285.

46. Green v. State, *supra*.

47. Illinois Steel Co. v. Mann, *supra*.

48. Siegler v. Mellinger, 203 Pa. St. 399, 52 Atl. R. 175, 93 Am. St. Rep. 767.

49. Ward v. Troy, 55 N. Y. App. Div. 192, 66 N. Y. Suppl. 925.

50. Nichols v. State, 100 Ala. 23, 14 So. R. 539.

51. Barber v. Manchester, 72 Conn. 675, 45 Atl. R. 1014 (largely discretionary with court).

52. Metropolitan Sav. Bank v. Manion, 87 Md. 68, 39 Atl. R. 90.

53. Locke v. Internat., etc., Ry. Co., 25 Tex. Civ. App. 145, 60 S. W. R. 314.

54. Rawls v. Am Mut. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280.

55. Brewster v. Weir, 93 Ill. App. 588.

56. Welch v. Franklin Ins. Co., 23 W. Va. 288.

57. Hughes v. Muscatine Co., 44 Ia. 672.

58. Majors v. State (Miss. 1904), 35 So. 825.

shown to the jury was made from the inside or outside;⁵⁹ as to whether two specimens of hair were from the same head;⁶⁰ as to the danger involved in coupling cars;⁶¹ as to the inducement in a seduction case;⁶² as to the dangerous nature of razing a building;⁶³ as to the suitability of female apparel;⁶⁴ as to the ability of a given person to manage employes;⁶⁵ as to the possibility of killing a man with a hoe within striking distance;⁶⁶ as to matters pertaining to ordinary bookkeeping;⁶⁷ as to the noninsurability of a habitual drunkard;⁶⁸ as to whether a person who is struck by a train running at full speed could possibly survive;⁶⁹ as to whether a person had sufficient time to alight from a train;⁷⁰ as to whether a given person acted like a lover;⁷¹ as

59. *Golson v. State*, 124 Ala. 8, 26 So. 975.

60. *Knoll v. State*, 55 Wis. 249, 12 N. W. R. 369, 42 Am. St. Rep. 704.

61. *Muldowney v. Ill. Cent. Ry. Co.*, 36 Ia. 462.

62. *Anderson v. State*, 104 Ala. 83, 16 So. R. 108.

63. *Nourie v. Theobald*, 68 N. H. 564, 41 Atl. 182.

64. *Compton v. Bates*, 10 Ill. App. 78.

65. *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. R. 46.

66. *Holmes v. State*, 100 Ala. 80, 14 So. R. 864.

67. *McKay v. Overton*, 65 Tex. 82.

68. *Rawles v. Amer. Mut. Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280.

69. *Chicago, etc., Ry. Co. v. Lewandowski*, 190 Ill. 301, 60 N. E. R. 497. See also, *Hellyer v. People*, 186 Ill. 550, 58 N. E. R. 245.

70. *Easler v. Southern Ry. Co.*, 59 S. C. 311, 37 S. E. R. 938.

71. *Carney v. State*, 79 Ala. 14.

to whether certain letters are "evasive,"⁷² etc.

"The true test of the admissibility of such testimony is not whether many persons or few have knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or jury in determining the questions at issue."⁷³ In many cases the matter rests in the sound discretion of the court.

72. Kellog v. Frazier, 40 Ia. 502.

73. Taylor v. Monroe, 43 Conn. 36, 44.

CHAPTER XVIII.

Proof of Handwriting.

§ 1. **In general.**—One of the most important rules of evidence is that the best evidence attainable must be produced. This rule does not exclude, however, the testimony of a person as to the handwriting of another. As said by Mr. Starkie, "There is not such a distinction between one man's knowledge of his own handwriting, and the knowledge of another on the same subject as constitutes the former evidence of a su-

perior degree to the latter."¹ And this rule is applicable to both civil and criminal cases.²

§ 2. **Ancient documents.**—Documents which are at least thirty years old, and which are produced from their proper custody, are presumed to be genuine; and the signature, as well as every other part of the document which purports to be in the handwriting of a given person, is presumed to be in his handwriting. No further proof is required upon this point. This presumption arises not only in the case of formal documents, such as deeds, mortgages, wills, etc., but also in the case of informal writings, such as receipts, letters, etc.³ But in the case of documents less than thirty years old their genuineness must be proved.

§ 3. **Opinion testimony admissible.**—Where the genuineness of handwriting has to be proved opinion testimony is admissible. Moreover, it may be given both by experts and non-experts. A non-expert, however, is not competent to give opinion testimony based upon the comparison of writings placed in juxtaposition.

1. Stark. Evid. 339 (6th Am. ed.). See also, *Leverts v. State*, 49 N. J. L. 26, 6 Atl. R. 521; *Burgess v. Burgess*, 44 Neb. 16, 62 N. W. R. 242.
2. *Hammond's Case*, 2 Greenl. (Me.) 33, 11 Am. Dec. 39; *De la Motte*, 21 How. St. Tr. 810.
3. *Scharff v. Keener*, 64 Pa. St. 376; *Berry v. Raddin*, 11 Allen. (Mass.) 579; *Bell v. Brewster*, 44 Ohio St. 694; *Doe v. Beynon*, 12 A. & E. 431.

§ 4. **Opinion of non-expert who has seen the party write.**—Opinion evidence of a non-expert who has seen the party, whose handwriting is in dispute, write even once is admissible;⁴ and even where the act was performed many years ago;⁵ and even where the impression of the witness is faint and somewhat vague;⁶ and even altho he has never seen him write more than his name.⁷

Where the witness has seen the party write, but is so illiterate himself that he is unable to read or write, some courts hold that he is not qualified to give opinion evidence of handwriting.⁸ Other courts, however, hold the contrary.⁹

§ 5. **Rule where the witness has corresponded with the party.**—Where the witness has acquired

4. *Vinton v. Peck*, 14 Mich. 287, 293; *Frank v. Berry*, 128 Ia. 223, 103 N. W. R. 358; *Com. v. Nefus*, 135 Mass. 553; *State v. Goodwin*, 37 La. Ann. 713; *Hammond v. Varian*, 54 N. Y. 398.
5. *Horne Tooke's Case*, 25 How. St. Tr. 71 (nineteen years before); *Wilson v. Van Leer*, 127 Pa. St. 371, 17 Atl. R. 1097, 14 Am. St. Rep. 854 and note; *Warren v. Anderson*, 8 Scott 384.
6. *Riggs v. Powell*, 142 Ill. 453, 32 N. E. R. 482; *Hammond's Case*, *supra* and note; *State v. Hall*, 16 S. D. 6, 91 N. W. R. 325. See also 16 Am. Law Rev. 569.
7. *Garrells v. Alexander*, 4 Esp. 37; *Warren v. Anderson*, *supra*; *Smith v. Walton*, 8 Grill (Md.) 18; *Rediout v. Newton*, 17 N. H. 71.
8. *People v. Corey*, 148 N. Y. 476, 42 N. E. R. 1066.
9. *Foye v. Patch*, 132 Mass. 105. For an able discussion of this question see *Woodman v. Dana*, 52 Me. 9. See also, *State v. Scott*, 45 Mo. 302; *Burnham v. Ayer*, 36 N. H. 182.

a knowledge of the handwriting of the party thru correspondence he is deemed competent to give opinion evidence.¹⁰ It has been held, however, that the correspondence must have been in the ordinary course of business; and furthermore, that it must have been relied upon.¹¹ According to the general trend of the decisions, however, the witness is competent to give opinion evidence as to the handwriting of his correspondent altho he did not act upon the letters received from him. The mere receipt of the letters, however, does not establish the fact that they were written by the person whose name is signed to them. Further evidence on this point is essential.¹²

§ 6. Rule where the party has acknowledged the writing as his.—Where the party, whose handwriting is in dispute, has acknowledged that he is the author of a given writing, which has been seen by the witness, the latter is competent to give opinion evidence as to the genuineness of the handwriting in dispute.¹³

10. *Thomas v. State*, 103 Ind. 419, 429; *Parsons v. McDaniel*, 62 Ga. 100; *Empire Manuf. Co. v. Stuart*, 46 Mich. 482; *Southern Exp. Co. v. Thornton*, 41 Miss. 216.
11. *Pinkham v. Cockell*, 77 Mich. 265, 43 N. W. R. 921.
12. *Hightower v. Ogletree*, 114 Ala. 94, 21 So. R. 934; *Pinkham v. Cockell*, 77 Mich. 272, 43 N. W. R. 921; *White S. M. Co., v. Gordon*, 124 Ind. 495.
13. *Second Nat. Bank v. Wentzel*, 151 Pa. St. 142 (genuineness of signature of note); *Berg v. Peterson*, 49 Minn. 420, 52 N. W. R. 37; *Riggs v. Powell*, 142 Ill. 453, 32

§ 7. Rule where letters of the party pass thru the witness' hands.—Altho the witness has never seen the party write, or had correspondence with him, yet, if he has acquired a knowledge of his handwriting in consequence of letters addressed by the party having passed thru his hands in the ordinary course of business he is competent to give opinion evidence as to the genuineness of that party's handwriting. As said by Lord Denham, "The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing though he never saw me write, nor received a letter from me."¹⁴ And similarly, where an official becomes familiar with the handwriting of a party thru the performance of his official duties he thereby becomes qualified to give opinion evidence as to the genuineness of the party's signature.¹⁵

§ 8. Rule where knowledge is acquired for the purpose of testifying.—Where the witness acquires knowledge of the party's handwriting for the sole purpose of giving opinion evidence of it such opinion testimony will be rejected, unless it clearly appears to the satisfaction of the court that the purpose in doing so was not to manufac-

N. E. R. 482 (acknowledgement implied); *Cabarga v. Seezer*, 17 Pa. St. 514; *Hammond v. Varian*, 54 N. Y. 398.

14. *Mudd v. Suckermore*, 5 Ad. & Ell. 703.

15. *Rogers v. Ritter*, 12 Wall. (U. S.) 317; *Amherst Bank v. Root*, 2 Metc. (Mass. 522; *Yates v. Yates*, 76 N. C. 142.

ture testimony.¹⁶ Moreover, some courts reject the testimony on the ground that the witness, under such circumstances, is naturally biased. As said in an Illinois case, "His knowledge was acquired under circumstances tending to bias his mind, imperceptibly tho it may have been to himself. It is scarcely probable that he did not have some impression of the genuineness of the signature before he examined the guardian's reports When, therefore, he investigated, however honest he may have believed himself to be, the natural tendency of his mind would most likely find something to confirm his preconceived opinion. In this way important differences may have been overlooked, and slight resemblances greatly magnified."¹⁷ Even an expert who acquires a knowledge of another's handwriting by watching him write several times for the sole purpose of testifying is incompetent.¹⁸

§ 9. **Expert opinion evidence admissible.** — Whenever handwriting is a subject of inquiry in a judicial proceeding expert opinion evidence is admissible.¹⁹

16. *Reese v. Reese*, 90 Pa. St. 89, 35 Am. Rep. 634 and note; *Reed v. State*, 20 Ga. 681; *Keith v. Lathrop*, 10 Cush. (Mass.) 453.

17. *Board of Trustees v. Misenheimer*, 78 Ill. 22, 24. See also, *Reese v. Reese*, *supra*; *Keith v. Lathrop*, *supra*.

18. *Reese v. Reese*, *supra*.

19. *Sweetser v. Lowell*, 33 Me. 450.

§ 10. **An expert witness.**—An expert is one who has acquired actual skill and scientific knowledge pertaining to the subject under consideration. He “must have been educated in the business about which he testifies; or it must first be shown that he has acquired skill and scientific knowledge upon the subject.”²⁰ The mere fact that he has occasionally compared signatures that have been the subject of dispute is not sufficient to qualify him as an expert.²¹ On the other hand, “It is enough that he has been engaged in some business which calls for frequent comparisons, and that he has in fact been in the habit for a length of time of making such comparisons.”²² It has been held that where a witness testifies that he is an expert in writing “by having written a great deal, and by having seen and read a great deal of writing,” he is qualified to give expert opinion evidence.²³ It also has been held that “one who does not profess to be an expert in handwriting, or whose avocation in life has not been such as to qualify him to judge of handwritings, should not be permitted to testify as an expert.”²⁴ Tellers²⁵ and cashiers²⁶ of

20. *Goldstein v. Black*, 50 Cal. 464.

21. *Goldstein v. Black*, *supra*.

22. *Ort v. Fowler*, 31 Kan. 478, 486.

23. *Chester v. State*, 23 Tex. Ct. of App. 583.

24. *State v. Tompkins*, 71 Mo. 613.

25. *Speider v. State*, 3 Tex. Ct. of App. 159.

26. *Dubois v. Baker*, 30 N. Y. 355, 361.

banks, writing masters,²⁷ writing engravers,²⁸ clerks in post offices,²⁹ bookkeepers,³⁰ county clerks,³¹ lawyers,³² and even sheriffs,³³ have been held, under certain conditions, competent expert witnesses in handwriting.

§ 11. **Modes of proving handwriting by comparison.**—There are two modes of proving handwriting by comparison. One is by comparing the writing, whose genuineness is in question, with an exemplar in the mind of the witness. The other is by comparing the writing with another writing which is proved or admitted to be genuine. By the former method a non-expert may be competent to make a comparison; but by the latter method he is not.

§ 12. **A comparison by juxtaposition.**—The question of proving handwriting by placing it in juxtaposition with a writing which is proved or admitted to be genuine is one upon which the decisions are in conflict. And this conflict exists not only as to the competency of expert witnesses to make the comparison, but also as to the competency of the jury to make it.

§ 13. **Competency of the jury to make the comparison.**—At common law, where genuine

27. *Moody v. Rowell*, 17 Pick. (Mass.) 490.

28. *Reg. v. Williams*, 8 C. & P. 34.

29. *Revett v. Braham*, 4 Term Rep. 49.

30. *State v. Ward*, 39 Vt. 225.

31. *State v. Phair*, 48 Vt. 366, 369.

32. *State v. Phair*, *supra*; *Eisfield v. Dill*, 71 Ia. 442, 445.

33. *Yates v. Yates*, 76 N. C. 142.

specimens of handwriting are introduced in evidence for purposes other than to make comparison, or where they constitute part of the record in the case, the jury may compare the writing in dispute with these standards.³⁴ The specimens, in such case, "being before the jury it is hardly possible to prevent a comparison being instituted."³⁵ On the other hand, where the specimens are introduced solely for the purpose of comparison the jury, at common law, are incompetent to make it. This rule, however, has been changed by statute. See § 16 of this chapter.

§ 14. **Reasons for the common-law rule.**—The reasons for the English common-law rule, which excluded the jury from making a comparison with specimens of handwriting introduced solely for that purpose, are stated by Mr. Best³⁶ as follows: "First, that the writings offered for the purpose of comparison with the document in question might be spurious, and consequently that, before any comparison between them and it could be instituted, a collateral issue must be tried to determine their genuineness. Nor is this all,—if it were competent to prove the genuineness of the main document with others, it must be equally so to prove that of the latter by comparison with fresh ones; and so the inquiry

34. *Doe v. Suckermore*, 5 Adol. & El. 703, 704. See also, *State v. Minton*, 116 Mo. 605, 614, 22 S. W. R. 808; *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346.

35. *Doe v. Suckermore*, *supra*.

36. Best, *Evid.* (10th ed.), § 238.

might go on *ad infinitum*, to the great distraction of the attention of the jury and delay in the administration of justice.³⁷ Secondly, that the specimens might not be fairly selected.³⁸ Thirdly, that the persons composing the jury might be unable to read, and consequently be unable to institute such comparison."³⁹

§ 15. **Expert opinion based upon a comparison by juxtaposition.**—Originally, the English common-law courts did not, as a general rule, admit expert opinion evidence of handwriting based upon a comparison by placing writings in juxtaposition.⁴⁰ This rule, however, as stated in § 16 of this chapter has been changed by statute. On the other hand, the ecclesiastical courts have always admitted this class of testimony.⁴¹

§ 16. **Same. The English statute.**—Upon this question the English statute provides as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuine-

37. Doe v. Suckermore, *supra*.

38. Burr v. Harper, Holt N. P. 420.

39. Eagleton v. Kingston, 8 Ves. 475.

40. Doe v. Suckermore, *supra*.

41. Reily v. Rivett, Prerog., 1 Cases in Eng. Eccl. Cts. 43, note a; Saph v. Atkinson, 2 Eng. Eccl. R. 64, 88, 89; Beaumont v. Perkins, 1 Phill. 78.

ness or otherwise of the writing in dispute.”⁴² It is expressly provided in the statute that it shall not apply to Scotland.

§ 17. Interpretation of the English statute.—Mr. Taylor, in interpreting the English statute, says: “Under this statutory law it seems clear, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury, but of the judge (see *Eagan v. Cowen*, 30 *Law Times* 223, in *Ir. Ex.*), may be used for the purpose of comparison, altho they may not be admissible in evidence for any other purpose in the cause (*Birch v. Ridgway*, 1 *Fost. & Fin.* 270; *Cresswell v. Jackson*, 2 *Fost. & Fin.* 24); and next, that the comparison may be made either by witnesses skilled in deciphering handwriting, or; without the intervention of any witnesses at all, by the jury themselves (*Cobbett v. Kilminster*, 4 *Fost. & Fin.* 490, per *Martin, B.*), or in the event of there being no jury, by the court.”⁴³

§ 18. Views in United States conflicting.—In this country the decisions upon the question of admitting expert opinion testimony of handwriting, based upon a comparison of writings placed in juxtaposition, are not harmonious.

42. 28 and 29 *Victoria*, ch. 18, § 8. A similar statute was enacted in 1854 (17 and 18 *Victoria*, ch. 125). This statute, however, was applicable only to civil cases. In 1865 the rule was extended by statute so as to apply also to criminal cases.

43. 2 *Taylor, Evid.*, § 1668.

In nearly all of the states the opinion testimony is admissible, provided the specimen of handwriting with which the one in dispute is compared is in the case for some other purpose.⁴⁴ This rule obtains in the federal courts.⁴⁵ But many of the state courts go farther than this and admit the opinion testimony even when it is based upon a comparison made with a specimen of handwriting which is not in the case for some other purpose, provided the specimen is proved or admitted to be genuine.⁴⁶

§ 19. **Case of Moore v. United States.**—This case was tried by the court of claims, which, like a court of equity, or admiralty, determines the facts as well as the law. The point involved, upon which the case was appealed to the su-

44. McDonald v. McDonald, 142 Ind. 55, 41 N. E. R. 336; State v. Thompson, 132 Mo. 301, 34 S. W. R. 31; Hazelton v. Union Bank, 32 Wis. 47; Fuller v. Fox, 101 N. C. 119, 9 Am. St. Rep. 27; Peck v. Callaghan, 95 N. Y. 73; Putnam v. Wadley, 40 Ill. 346; Bradford v. People, 22 Colo. 157, 43 Pac. R. 1013; Moon v. Crowder, 72 Ala. 79.
45. Moore v. United States, 91 U. S. 270; Williams v. Conger, 125 U. S. 270; United States v. Hickory, 151 U. S. 303; Stokes v. United States, 157 U. S. 194; Withrop v. United States, 127 Fed. R. 530.
46. Williams v. Conger, 125 U. S. 270; Stokes v. United States, 157 U. S. 194; United States v. Hickory, 151 U. S. 303; State v. Zimmerman, 47 Kan. 242; University of Illinois v. Spaulding, 71 N. H. 163, 51 Atl. R. 731; Costello v. Crowell, 139 Mass. 588; *In re Rockey's Est.*, 155 Pa. St. 453; Morrison v. Porter, 35 Minn. 425, 59 Am. Rep. 331; State v. Farrington, 90 Ia. 673, 57 N. W. R. 606; State v. Thompson, 80 Me. 194, 6 Am. St. Rep. 172.

preme court of the United States, was whether the court of claims did right or not in comparing a disputed signature with a signature on another paper which was in evidence for other purposes in the case, and respecting which latter signature there was no doubt as to its genuineness. And the supreme court held that the comparison was properly made. In the opinion Mr. Justice Bradley says, "We think that where congress has not provided, and no special reason demands a different rule, the rules of evidence as found in the common law ought to govern the action of the court of claims. If a more liberal rule is desirable, it is for congress to declare it by a proper enactment. But the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury."⁴⁷

§ 20. Trend of the courts in the United States.

—The trend of the courts in this country is to extend the common-law rule by admitting expert opinion testimony based upon a comparison with a specimen which is proved or admitted to be genuine, irrespective of the fact that it is not in evidence for any other purpose.

§ 21. **State statutes on the subject.**—In a number of the states, including New York, New Jersey, Iowa, Texas, Georgia, Rhode Island, Oregon and California, statutes, substantially in harmony with the English statute, stated in § 16, have been enacted.

§ 22. **Genuineness of the specimen used.**—The genuineness of the specimen used with which the comparison is made must be established to the satisfaction of the court.⁴⁸ It has been held, however, that this is a matter which rests solely with the jury.⁴⁹ Upon principle, however, the admissibility of the opinion based upon the comparison is a question for the court to decide; and in doing so it takes into consideration the question of the genuineness of the specimen.

To render the specimen usable for the purpose of comparison its genuineness must be established by positive proof. As said in a Massachusetts case, it "must be shown beyond a doubt."⁵⁰ The mere fact that a given letter was received in reply to one sent is not sufficient proof of the genuineness of the former to render

48. *People v. Molineux*, 168 N. Y. 264, 61 N. E. R. 286; *Com. v. Coe*, 115 Mass. 504; *State v. Thompson*, *supra*.

49. *State v. Hastings*, 53 N. H. 452, 461. See also, *State v. Ward*, 39 Vt. 225. The latter court, however, seems subsequently to have adopted the contrary view. See, *Rowell v. Fuller*, 59 Vt. 688.

50. *Martin v. Maguire*, 7 Gray, 177. See also, *Hydev. Woolfolk*, 1 Ia. 160.

it usable as a specimen with which to compare another writing.⁵¹

§ 23. **Rule where the specimen cannot be produced.**—Ordinarily, the comparison should be made by the expert in court.⁵² The specimen should be available so that other experts might be able to give opinion based upon comparison, with the view of impeaching or corroborating the former expert. But where it is not feasible to produce the specimen, as, for example, where it is lost, it has been held that an expert, who saw the specimen, may base his opinion on a comparison of his recollection of it with the disputed writing.⁵³ This principle has been applied to entries in hotel registers,⁵⁴ and to checks that cannot be produced where the defendant is on trial for forgery.⁵⁵

§ 24 **Comparison of ancient documents.**—As previously stated, the rule at common law excluded proof of handwriting by placing writings in juxtaposition and comparing them. To this rule there were two exceptions, both of which are still recognized. One of these exceptions is stated in the last sentence in § 19 of this chapter.

51. *McKeone v. Barnes*, 108 Mass. 344. See also, *Winch v. Norman*, 65 Ia. 186.

52. *Woodman v. Dana*, 52 Me. 9; *Haynes v. McDermott*, 82 N. Y. 41.

53. *Koons v. State*, 36 Ohio St. 195; *Abbott v. Coleman*, 21 Kan. 250.

54. *State v. Shinborn*, 46 N. H. 497.

55. *Koons v. State*, *supra*.

The other exception is stated by Mr. Best as follows: "When a document is of such a date that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write or by having held correspondence with him, the law, acting on the maxim, *lex non cogit impossibilia*, allows other ancient documents which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one."⁵⁶

§ 25. Use of photographic copies for purpose of comparison.—Photographs have frequently been held admissible to give the jury a description of the *locus in quo*,⁵⁷ and also for the purpose of identifying a person.⁵⁸

But a photographic copy of a signature or writing is secondary evidence; and is inadmissible for the purpose of comparison, or for any other purpose, without first laying a proper foundation for using secondary evidence. If the original is available the photographic copy is inadmissible.⁵⁹ "No authority seems to justify the

56. Best, Evid. (10th ed.) § 240. See also, to same effect, Doe v. Suckermore, 5 Adol. & Ell. 703; Clark v. Wyatt, 15 Ind. 271, 77 Am. Dec. 20; Sweigart v. Richards, 8 Pa. St. 436; Strothers v. Lucas, 6 Peters (U. S.) 763. See also, note, 6 Am. Dec. 171.

57. Randall v. Chase, 133 Mass. 210; Dyson v. New York, etc., Ry. Co., 57 Conn. 9; Barker v. Perry, 67 Ia. 146.

58. Ruloff v. People, 45 N. Y. 213; Brooke v. Brooke, 60 Me. 529.

59. Eborn v. Zupelman, 47 Tex. 503.

proof of the handwriting of obtainable originals by any species of imitation or copy.”⁶⁰ “The original, and not the copy, is what the jury must act upon, and no device can be properly allowed to supercede it. Copies of any kind are merely secondary evidence, and in this case they (photographic copies) were intended to be used as equivalent to primary evidence in determining the genuineness of the primary document.”⁶¹

On the other hand, where a proper foundation has been laid for the use of photographic copies of signatures or writings, and satisfactory proof has been made as regards the sufficiency and exactness of the process of producing them, they have been held competent for the purpose of making comparison. As said in a Massachusetts case, “Under proper precautions in relation to the preliminary proof as to the exactness and accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objections to the use of such proposed representations of original and genuine signatures as evidence competent to be considered and weighed by a jury.”⁶²

But the mere fact that the photographic copies were made by a scientific process is not sufficient proof of their exactness. As said in a New York case, “We may recognize that the photographic process is ruled by general laws that are uni-

60. *Maclean v. Scripps*, 52 Mich. 214, 219.

61. *Matter of Alfred Foster's Will*, 34 Mich. 23.

62. *Marcy v. Barnes*, 16 Gray, 160.

form in their operation, and that almost without exception a likeness is brought forth of the object set before the camera. Still somewhat for exact likeness will depend upon the adjustment of the machinery, upon the atmospheric conditions and the skill of the manipulator. And in so delicate a matter as the reaching of judicial results by the comparison of writings thru the testimony of experts, it ought to be required that the witness should exercise his acumen upon the thing itself which is to be the basis of his judgment; and still more, that thing itself should be at hand to be put under the eye of the other witnesses for the trial upon it of their skill. The certainty of expert testimony in these cases is not so well assumed as that we can afford to let in the errors or differences in copying, tho it be done by howsoever a scientific process."⁶³

§ 26. Use of letterpress copies for purposes of comparison.—Letterpress copies of a signature or writing, for the purpose of comparison, are inadmissible. As said in a California case, "It would be adding vastly to the danger of such evidence (letterpress copies), to permit evidence to be given from a comparison of genuine writings with a press copy of the writing whose genuineness was in dispute."⁶⁴ And as said in a Pennsylvania case, "Here there was merely a copy—a press copy, it is true—of the nature of a

63. *Hynes v. McDermott*, 82 N. Y. 41.

64. *Spottisford v. Weir*, 66 Cal. 525.

fac-simile, but not necessarily exact, as the spreading of ink in such copies often obliterates the fine lines of a handwriting, tho substantially preserving its original form. It is manifest such copies would be an unsafe standard. I know of no authority for their introduction, and upon principle they are inadmissible."⁶⁵

§ 27. **Use of fictitious specimens on cross-examination.**—With the view of impeaching the credibility of an expert who has given opinion evidence of handwriting, attempts are sometimes made, against objection, to elicit from him, on cross-examination, his opinion as to the genuineness of real and fictitious specimens. This class of testimony, however, is, for several reasons, inadmissible. First, to admit such specimens would be to introduce collateral issues which would unduly complicate the case.⁶⁶ Secondly, inasmuch as the issues raised in such case would be collateral and immaterial to the real issue in the case the answers by the witness would be conclusive.⁶⁷ And thirdly, the introduction of such specimens would operate as a surprise to the party who called the witness, and consequently he would not be prepared to meet them.⁶⁸

In a New York case, in which an action was

65. *Cohen v. Teller*, 93 Pa. St. 123.

66. *Massey v. Bank*, 104 Ill. 327; *Howard v. Patrick*, 43 Mich. 121, 128; *Rose v. First National Bank*, 91 Mo. 399.

67. *Van Wyck v. McIntosh*, 14 N. Y. 439; *Dietz v. Fourth Nat. Bank*, 69 Mich. 287, 289.

68. Cases cited in foot-note 67.

brought on a promissory note and the defense was that the signature was a forgery, an expert witness was asked on his cross-examination which of thirty-three signatures submitted to him were genuine and which were not. An objection to this question was overruled. This ruling, however, was held prejudicial error. "It was not material to the issue to show whether any of those thirty-three signatures were genuine or false. . . . It is plain the signatures were prepared for the sole purpose of testing the skill of the witnesses. O'Neil's attention was called to them in the belief that he would not be able to pick out the genuine from the false. He expressed his opinion. . . . But how was it material whether those thirty-three signatures were genuine or not? The issue was as to the signatures to the note. Whether O'Neil was right or wrong as to the thirty-three signatures it did not aid in determining the real issue. It was a collateral issue, and if, by possibility, O'Neil could have been legally permitted or required to answer the question, his answer would have been conclusive upon the plaintiff. She could not afterwards call witnesses to contradict him on that collateral and immaterial issue."⁶⁹ It has been held, however, that an expert may be asked on his cross-examination whether the writing in issue and another which is not admitted or

69. *Hilsey v. Palmer*, 32 Hun 472.

proved to be genuine are in the same handwriting.⁷⁰

§ 28. Comparison of handwriting to prove identity of a person.—A comparison of different specimens of handwriting for the purpose of identifying a person has frequently been allowed. Thus, in actions for libel, sending threatening letters, arson, etc., this class of testimony has been admitted. In the celebrated Tichborn case this class of evidence was admitted. And also in the celebrated murder case of *Com. v. Webster*.⁷¹ In the latter case the comparison was made for the purpose of showing that Webster was the author of certain anonymous letters the purpose of which letters was to mislead the public officials.

70. *Thomas v. State*, 103 Ind. 419.

71. *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

PART III.

Real Evidence.

CHAPTER I.

Inspection by Court and Jury.

§ 1. **In general.**—The three channels thru which tribunals acquire information upon which to base their decisions are witnesses, documents and inspection. That acquired by inspection is called real evidence. It is evidence acquired by the court or jury thru the medium of their own senses of seeing, hearing, smelling, tasting, etc. This class of testimony is entitled to the greatest weight. As said by Robertson, C. J., "To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is, therefore, the first principle in the philosophy of evidence."¹

§ 2. **Admissibility of real evidence.**—The question of admitting real evidence in a given case is one which rests largely in the discretion of the court.² When materially relevant to the fact in

1. *Gentry v. McGinnis*, 3 Dana (Ky.) 382, 386.

2. *Leonard v. So. Pac. Ry. Co.*, 21 Oreg. 555, 28 Pac. R. 887, 15 L. R. A. 221; *Marshall v. Gault*, 15 Ala. 682; *State v. Phillips*, 118 Ia. 660, 92 N. W. R. 876; *People v. Sullivan*, 129 Cal. 557, 62 Pac. R. 101.

issue, and no sound reason exists for its exclusion, it should be admitted.

As a general rule, the action of the trial court in admitting or excluding real evidence is not subject to review by a higher court.³ It has been held, however, that an unreasonable exercise of discretion is prejudicial error.⁴

§ 3. Origin of rule admitting real evidence.—The rule admitting real evidence is of ancient origin. As said by Prof. Thayer, "Nothing is older or commoner in the administration of law, in all countries, than the submission to the senses of the tribunal itself, whether the judge or jury, of objects which furnish evidence. . . . Many of the things which were formerly submitted to the inspection of the judges only, have now passed over to the jury."⁵

§ 4. When inspection is not allowed.—Courts usually reject real testimony where its nature is such as to unduly prejudice the jury by exciting either their sympathies,⁶ or their antipathies;⁷

3. *Knowles v. Crampton*, 55 Conn. 336, 11 Atl. R. 593; *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. R. 672.

4. *French v. Wilkinson*, 93 Mich. 322, 53 N. W. R. 530; *Gen. Elec. Light, etc., Co.* 107 Ky. 485, 54 S. W. R. 723; *Mann v. Sioux City, etc., Ry. Co.*, 46 Ia. 637; *Hunter v. Allen*, 35 Barb. (N. Y.) 42; *Philadelphia v. Rule*, 93 Pa. St. 15.

5. *Thayer's Cases on Evid.* (2d. ed.) 720.

6. *Rost v. Brooklyn Heights Ry. Co.*, 10 N. Y. App. Div. 477, 31 N. Y. Suppl. 1069, 4 N. Y. Annot. Cas. 19 (amputated leg).

7. *Selleck v. Janesville*, 104 Wis. 570, 80 N. W. R. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691 (photograph).

or where it would unduly complicate the case with collateral facts;⁸ or where it is so offensive,⁹ or indecent,¹⁰ as to shock the sensibilities; or where it would tend to mislead the jury;¹¹ or where it is too remotely connected with the fact in issue;¹² or where it is so cumbersome as to unduly retard the case.¹³

§ 5. **Scope of real evidence.**—The scope of this class of testimony is broad. It extends to all lines of human activity. It includes all classes of things which are material and legally relevant to the investigation. Thus, the following articles have been held to be competent real evidence: a horse;¹⁴ a dog;¹⁵ a door;¹⁶ a rope and an iron bar;¹⁷ a broken bolt;¹⁸ a broken stair;¹⁹

8. *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. R. 641; *Tudor Iron Works v. Weber*, 129 Ill. 531, 21 N. E. R. 1078 (torn clothing).
9. *Knowles v. Crampton*, 55 Conn. 336, 11 Atl. R. 593.
10. *Vierling v. Binder*, 113 Ia. 337, 85 N. W. R. 621; *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. R. 462; *Warlick v. White*, 76 N. C. 175.
11. *Hagan v. Carr*, 198 Pa. St. 606, 48 Atl. R. 688 (diagram); *Stewart v. Everts*, 76 Wis. 35, 44 N. W. R. 1092, 20 Am. St. Rep. 17; *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81.
12. *Osborne v. Detroit*, 32 Fed. R. 36.
13. *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. R. 324; *Jacobs v. Davis*, 34 Md. 204.
14. *Dillard v. State*, 58 Miss. 368.
15. *Line v. Taylor*, 3 F. & F. 731.
16. *People v. Durant*, 116 Cal. 179, 48 Pac. R. 75; *State v. Goddard*, 146 Mo. 177, 48 S. W. R. 82.
17. *People v. Flannigan*, 174 N. Y. 355, 66 N. E. R. 988.
18. *Boucher v. Robeson Mills*, 182 Mass. 500, 65 N. E. R. 819.
19. *Lynch v. Swan*, 167 Mass. 510, 46 N. E. R. 51.

a piece of a car flange;²⁰ a human skull;²¹ a watch;²² a speculum surgical chair;²³ a mirror;²⁴ torn clothing;²⁵ defective building material;²⁶ piece of column;²⁷ bones of the deceased;²⁸ burglars' tools;²⁹ stolen trousers;³⁰ coal bucket;³¹ foot prints;³² mutilated members of deceased;³³ various kinds of weapons;³⁴ a young elephant;³⁵ horse shoes;³⁶ shingles;³⁷ defective fruit boxes;³⁸

20. *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. R. 111.
21. *McNaier v. Manhattan Ry. Co.*; 4 N. Y. Suppl. 310 (to explain injuries); *Savary v. State*, 62 Neb. 166, 87 N. W. R. 34; *Thrawley v. State*, 153 Ind. 375, 55 N. E. R. 95.
22. *Stone v. Boston, etc., Ry. Co.*, 72 N. H. 206, 55 Atl. R. 359.
23. *Com. v. Brown*, 121 Mass. 69.
24. *Hudson v. Ross*, 76 Mich. 173.
25. *Tudor Iron Works v. Weber*, 129 Ill. 535; *Quincy Gas & Elec. Co. v. Bauman*, 203 Ill. 295, 67 N. E. R. 806.
26. *People v. Buddensieck*, 103 N. Y. 487, 57 Am. Rep. 766.
27. *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23, 15 S. W. R. 208.
28. *Turner v. State*, 89 Tenn. 547, 564.
29. *Foster v. People*, 63 N. Y. 619; *State v. Ellwood*, 17 R. I. 763.
30. *Adams v. State*, 93 Ga. 166, 18 S. E. R. 553.
31. *Penn. Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. R. 938 (mode of operation shown).
32. *People v. Searcy*, 121 Cal. 1, 53 Pac. R. 359, 41 L. R. A. 157; *Whetson v. State*, 31 Fla. 240, 12 So. R. 661.
33. *Turner v. State*, *supra*.
34. *Spies v. People*, 122 Ill. 236; *Com. v. Brown*, 121 Mass. 69; *Sibley v. Smith*, 133 Ind. 677.
35. 20 Alb. L. Journal, 150.
36. *Evarts v. Middlebury*, 53 Vt. 626.
37. *Morton v. Fairbanks*, 11 Pick. (Mass.) 368.
38. *Thomas Fruit Co. v. Start*, 107 Cal. 206.

defective tow line;³⁹ dressmaker's frame;⁴⁰ partly burned block of wood;⁴¹ a rotten plank;⁴² teeth of deceased;⁴³ underclothing;⁴⁴ a shovel,⁴⁵ etc.

§ 6. Repulsive or indecent real evidence.—

Real testimony which is of doubtful utility and offensive in its nature is usually rejected.⁴⁶ And circumstances may justify the rejection of real testimony because of its indecent nature. But the mere fact that certain real testimony savors of indecency does not justify its rejection. "When justice and the discovery of truth are at stake, the ordinary canons of modesty and delicacy of feeling cannot be allowed to impose a prohibition upon necessary measures. If such matters were not unshrinkingly discussed and probed,

39. *Stevenson v. Michigan Log Towing Co.*, 103 Mich. 412, 61 N. W. R. 536.
40. *People v. Durant*, 116 Cal. 179, 48 Pac. R. 75 (to exhibit clothes of murdered woman).
41. *Paulson v. State*, 118 Wis. 89, 94 N. W. R. 771.
42. *Viellese v. Green Bay*, 110 Wis. 165, 85 N. W. R. 665.
43. *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.
44. *State v. Murphy*, 118 Mo. 7, 25 S. W. R. 95 (rape case); *State v. Peterson*, 110 Ia. 647, 82 N.W.R. 329 (rape case).
45. *Mitchell v. State*, 94 Ala. 68, 10 So. R. 518.
46. *Knowles v. Crampton*, 55 Conn. 336, 341. See also, *Com. v. Brelsford*, 161 Mass. 61, 63 (jurors not allowed to sample intoxicating liquor); *State v. Coggins*, 10 Kan. 455 (jurors not allowed to examine and smell bottles of whiskey); *Regina v. Palmer*, Annual Register (1856) 422, 473, 475 (exhibition of effect of strychnia on dogs not allowed). *Contra*: *People v. Kinney*, 124 Mich. 486 (jurors allowed to taste cider for purpose of learning whether it was "hard" or not).

many kinds of crime would remain unpunished. Nevertheless, needless offence to feelings of delicacy, especially by public exhibitions before idle spectators having no responsibility for the cause of justice, may well be avoided."⁴⁷ The modern tendency is to allow this class of testimony to go to the jury, but in the absence of spectators not concerned in the issue. It has been held, however, that the court should not allow an indecent exposure of the person before the jury.⁴⁸

§ 7. Voluntary exhibition of bare parts of the body.—In personal injury cases this species of real testimony is frequently admitted.⁴⁹ The objection sometimes made to it is that in case of an appeal to a higher court this class of testimony could not be embodied in the bill of exceptions. But this objection is not considered tenable. Another objection is that such testimony unduly excites the feelings of the jury. But in actions for *personal injuries*, it is the constant

47. Wigmore on Evid., vol. II, § 1159.

48. *Garrick v. Ry. Co.* 124 Ia. 691; 100 N. W. R. 498; *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. R. 142, 83 Am. St. Rep. 889.

49. *Longworthy v. Green*, 95 Mich. 93, 96; *Tudor Iron Works v. Weber*, 129 Ill. 535; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. R. 521; *Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. R. 892; *Arkansas Riv. Packet Co. v. Hobbs*, 105 Tenn. 29, 58 S. W. R. 278; *Keith v. New Hampshire, etc., Co.*, 140 Mass. 175, 180; *Faivre v. Manderscheid*, 117 Ia. 724, 90 N. W. R. 76.

practice for the plaintiff to voluntarily exhibit the injured part to the jury; and where *identity, resemblance* or the *appearance of things* is in question, it is a familiar practice to present such things for the inspection of the jury, if it is practicable.⁵⁰ Thus, it has been held that in an action for damages for personal injuries caused by the defendant's negligence, the plaintiff may exhibit, for inspection by the jury, his hand;⁵¹ leg;⁵² foot;⁵³ arm;⁵⁴ eye-socket;⁵⁵ a rupture;⁵⁶ thumb;⁵⁷ hip and spine;⁵⁸ knee;⁵⁹ or other part of his body. Moreover, an expert may examine the injured member in the presence of the jury.⁶⁰

50. Jones on Evid., § 398 (400).

51. *People v. Kelly*, 94 N. Y. 526; *Indiana Car Co. v. Parker*, 100 Ind. 181.

52. *Haynes v. Trenton*, 123 Mo. 326, 27 S. W. R. 622; *Langworthy v. Green Tp.*, 95 Mich. 93, 54 N. W. R. 697; *Mulhado v. Brooklyn City Ry. Co.*, 30 N. Y. 370; *West Chicago St. Ry. Co. v. Grenell*, 90 Ill. App. 30.

53. *Edwards v. Three Rivers*, 96 Mich. 625, 55 N. W. R. 1003; *Louisville, etc., Ry. Co. v. Wood*, 113 Ind. 544, 14 N. E. R. 572, 16 N. E. R. 197.

54. *Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. R. 892; *Hatfield v. St. Paul, etc., Ry. Co.*, 33 Minn. 130, 22 N. W. R. 176, 53 Am. Rep. 14.

55. *Orscheln v. Scott*, 90 Mo. App. 352.

56. *Chicago, etc., Ry. Co. v. Clausen*, 173 Ill. 100, 50 N. E. R. 680.

57. *Freeman v. Hutchinson*, 15 Ind. App. 639, 43 N. E. R. 16.

58. *Citizens' St. Ry. Co. v. Willoebv*, 134 Ind. 563, 33 N. E. R. 627.

59. *Arkansas Riv. Packett Co. v. Hobbs*, *supra*.

60. *Lanark v. Dougherty*, *supra*; *Haynes v. Trenton*, 123 Mo. 326, 27 S. W. R. 622.

It has been held, however, that in an action against a surgeon for malpractice in setting a woman's knee another physician may not examine the knee in the presence of the jury.⁶¹ And a third party may not exhibit, for the inspection of the jury, his injured limb for the purpose of enlightening them in regard to the plaintiff's limb.⁶² Such testimony would be irrelevant. On the ground of indecency, exhibition of the organs of generation for the inspection of the jury is not allowable. As said by Ryan, C. J., "If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it."⁶³

§ 8. Exhibition of child for inspection of jury in a bastardy case.—Upon this question the decisions are not harmonious. Some courts reject this class of testimony, especially in the case of a mere baby, on the ground that it is too fanciful and unsatisfactory a character to be received.⁶⁴ By the great weight of authority, however, such

61. *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. R. 462.

62. *Grand Lodge B. of R. T. v. Randolph*, 186 Ill. 89, 57 N. E. R. 882.

63. *Brown v. Swineford*, *supra*.

64. *Risk v. State*, 19 Ind. 152; *Clark v. Bradstreet*, 80 Me. 456 (babe six weeks old); *State v. Danforth*, 48 Ia. 43, 30 Am. Rep. 387 (babe three months old); *State v. Harvey*, 112 Ia. 416, 84 N. W. R. 535, 84 Am. St. Rep. 350, 52 L. R. A. 500, and note (babe nine months old). See also *Beck's Med. Juris.* 650.

inspection is allowable.⁶⁵ Lord Mansfield says, "I have always considered likeness as an argument of a child's being the son of a parent."⁶⁶ And Garrison, J., says, "Inspection is like admission in that, while not testimony, it is an instrument for dispensing with the testimony, and, in a doubtful case, the class of testimony it dispenses with might be a controlling circumstance. Thus regarded, and in view of the almost worthlessness of the testimony of witnesses adduced on the question of the resemblance of a bastard to an alleged parent, it is obvious that inspection is, on this account, to be preferred."⁶⁷

§ 9. Inspection of person to determine age, race, color, identity, sex, credibility, intelligence, etc.—For the purpose of determining a person's age,⁶⁸ race,⁶⁹ color,⁷⁰ identity,⁷¹ sex,⁷² credibil-

65. *Linton v. State*, 88 Ala. 216; *State v. Horton*, 100 N. C. 443 (indictment for seduction); *Com. v. Jordan*, 49 Ohio State 445; *Gaunt v. State*, 50 N. J. L. 490, 495; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. R. 871; *Kelly v. State*, 133 Ala. 195, 32 So. R. 56, 91 Am. St. Rep. (babe a year old); *Crow v. Jordan*, 49 Ohio St. 655; *State v. Smith*, 54 Ia. 104, 37 Am. Rep. 192 (child two years old); *State v. Saidell*, 70 N. H. 174, 46 Atl. R. 1083, 85 Am. St. Rep. 627.

66. *Douglas Case*. See *Wills' Circum. Evid.* (5th Am. ed.) 117.

67. *Gaunt v. State*, *supra* (a celebrated case containing an extended discussion on real evidence).

68. *People v. Elco*, 13 Mich. 519, 91 N. W. R. 755, 94 N. W. R. 1069; *Hermann v. State*, 73 Wis. 248, 41 N. W. R. 171, 9 Am. St. Rep. 789; *Com. v. Emmons*, 98 Mass. 6; *Williams v. State*, 98 Ala. 52, 13 So. R. 333.

ity,⁷³ intelligence,⁷⁴ etc., the jury may, in the discretion of the trial judge, make an inspection of such person; and, in the case of a trial without a jury, the court may do likewise. Moreover, the court, in passing upon the competency of a person of tender years to act as a witness, may give consideration to his general appearance and intelligence.⁷⁵ Where a person is on trial for selling a minor intoxicating liquor, and the latter's age is in dispute, some courts hold that in a comparatively close case the jury may not inspect the alleged minor for the purpose of determining the question.⁷⁶ By the weight of authority, however, such inspection is allowable in the discretion of the trial court.⁷⁷

§ 10. **Inspection of photographs by the jury.**—

The submission of photographs to the jury for their inspection is usually a matter that rests

69. *Garvin v. State*, 52 Miss. 207; *Jones v. Jones*, 45 Md. 144; *Warlick v. White*, 76 N. C. 175.

70. *Garvin v. State*, *supra*; *Warlick v. White*, *supra*; *State v. Saidell*, 70 N. H. 174; *Clark v. Bradstreet*, 80 Me. 454.

71. *Williams' Case*, 29 Fed. Cas. No. 17,709, Crabbé 243.

72. *Herman v. State*, *supra*.

73. *Com. v. Buccieri*, 153 Pa. St. 535, 26 Atl. R. 228; *Walls v. Ducharme*, 162 Mass. 432, 38 N. E. R. 1114.

74. *Com. v. Robinson*, 165 Mass. 426, 43 N. E. R. 121; *State v. Juneau*, 88 Wis. 180, 59 N. W. R. 580, 43 Am. St. Rep. 877, 24 L. R. A. 857; *Wheeler v. United States*, 159 U. S. 523; *State v. Richie*, 28 La. Ann. 327, 26 Am. Rep. 100.

75. Cases cited in foot-note 74.

76. *Bird v. Stone*, 104 Ind. 384.

77. *Hermann v. State*, 73 Wis. 248; *Com. v. Hollis*, 170 Mass. 433.

in the discretion of the trial court. Juries frequently have been allowed to inspect photographs to acquire information pertaining to the *loqus in quo*. Thus, where a murder occurs in a given building and the plan of the building is a legally relevant evidentiary fact to the fact in issue, a photograph of the premises, which shows the plan, may, in the discretion of the court, be inspected by the jury. Again, where the character of a wound is legally relevant to the issue a photograph of the wound may, in the discretion of the court, be inspected by the jury. Thus, in a murder case, where the deceased's throat was cut, and the body buried, the court allowed the jury to inspect a photograph of the wound. On appeal, the supreme court said: "The throat of deceased was cut; the character of the wound was important to elucidate the issue; the man was killed and buried, and a description of the cut by witnesses must have been resorted to; we cannot conceive of a more impartial and truthful witness than the sun, as its light stamps and seals the similitude of the wound on the photograph put before the jury; it would be more accurate than the memory of witnesses, and as the object of all evidence is to show the truth, why should not this dumb witness show it. Usually the photograph is introduced to prove identity of person, but why not to show the character of the wound? In either case it is evidence; it throws light on the issue."⁷⁸ Photographs of a writing are also admissible to prove its contents.

And especially so where the photograph is an enlarged one.⁷⁹ In such case the mode of proving the contents of the writing is not dissimilar to the examination with a magnifying glass.⁸⁰

A photograph is inadmissible, however, where it would tend to unduly prejudice the minds of the jury. Thus, in an action for damages for the death of the plaintiff's wife, who was a handsome woman, and who was killed by defendant's train, a photograph of the woman was held inadmissible. A statute limited the recovery to pecuniary damages, and the court said: "The action was to recover for pecuniary injuries resulting from decedent's death. Such injuries are to be compensated for on the basis of the monetary value of the services of deceased to her husband and children. Into such a case the personal element does not enter, for the law does not compensate for grief or sorrow, but only for the actual pecuniary loss. The introduction in evidence of the photograph of a handsome woman could not be expected to accomplish any other result than to introduce the personal element for the consideration of the jury."⁸¹ And a photograph which is grossly indecent is inadmissible. Thus, in action for damages for personal injuries

78. *Franklin v. State*, 69 Ga. 36, 47 Am. Rep. 748. See also, Whart. Crim. Evid. 544; 1 Bish. Crim. Proc. 1097, and cases cited in them.

79. 1 Greenl. on Evid. (16th ed.) 439.

80. *Marcy v. Barnes*, 16 Gray (Mass.) 161.

81. *Smith v. Lehigh Valley Ry. Co.*, 177 N. Y. 379, 384.

caused by being struck by a train, photographs showing rear views of the plaintiff, a girl twenty years old, nude from below the shoulders to mid-thighs, was held inadmissible on the ground of indecency. "Such photographic exposure of the body of a twenty-year old girl in a court room full of men is . . . grossly improper and shocking. . . . No such indecency is ever necessary, or should be tolerated in court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony given of it."⁸² Nor by the weight of authority may a photographic reproduction of the genuine signature of a person, whose signature is in dispute, be used as a standard with which to compare the disputed signature.⁸³

§ 11. Compulsory exhibition of articles for inspection of the jury.—Compulsory exhibition of articles for the inspection of the jury is a matter which rests in the sound discretion of the court.⁸⁴ While it has been held that the court may not be compelled to submit articles to the jury for inspection,⁸⁵ it also has been held that an unreasonable exercise of the court's discretion would

82. *Guhl v. Whitcomb et al.*, 109 Wis. 69.

83. *Geer v. Lumber and Mining Co.*, 134 Mo. 85, 95, 98. See also, *Hynes v. McDermott*, 82 N. Y. 51.

84. *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. R. 672.

85. *Hunter v. Allen*, 35 Barb. (N. Y.) 42 (watch in pocket).

be prejudicial error.⁸⁶ Where the articles submitted for the inspection of the jury constitute the best testimony obtainable and are legally relevant to the issue, the jury should be allowed to inspect them, unless a reasonable ground exists for holding otherwise.⁸⁷

§ 12. **Compulsory exhibition of injured parts of the body in civil cases.**—Upon this question the decisions are not harmonious. The question has arisen frequently in personal injury cases. Many courts hold that in such cases the court may order an examination of the plaintiff's injuries by a competent physician and surgeon,⁸⁸ while other courts, in the absence of statutes, hold the contrary.⁸⁹ In several states, including

86. *Philadelphia v. Rule*, 93 Pa. St. 15; *French v. Wilkinson*, 93 Mich. 322, 53 N. W. R. 530 (limb of tree three years and four months after injury); *Hughes v. Gen. Elec. Light, etc., Co.*, 107 Ky. 485, 54 S. W. R. 723.

87. *Com. v. Holliston*, 107 Mass. 232 (diagram).

88. *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 21 N. W. R. 524, 50 Am. Rep. 154; *Owens v. Kansas City, etc., Ry. Co.* 95 Mo. 169, 8 S. W. R. 350, 6 Am. St. Rep. 39; *Wanek v. Winona*, 78 Minn. 98, 80 N. W. R. 581, 79 Am. St. Rep. 354, 46 L. R. A. 448; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584. *Alabama, etc., Ry. Co. v. Hill*, 90 Ala. 71, 8 So. R. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442; *Schroeder v. Chicago, etc., Ry. Co.*, 47 Ia. 375; *Richmond, etc., Ry. Co. v. Childress*, 82 Ga. 719, 9 S. E. R. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808; *Swift & Co. v. Rutkowski*, 182 Ill. 18, 54 N. E. R. 1038; *Hatfield v. Ry. Co.*, 33 Minn. 130, 22 N. W. R. 176, 53 Am. St. Rep. 14.

89. *Union Pacific Ry. Co. v. Botsford* 141 U. S. 250; *Stack v. New York, etc., Ry. Co.*, 177 Mass. 155, 58 N. E. R. 686,

New York and New Jersey, statutes have been enacted which authorize the court to order an examination in this class of cases. These statutes have been declared constitutional.⁹⁰ In Kansas, Ohio and Indiana it has been held to be a matter of right.^{90a}

§ 13. **Same. Case of Union Pacific Ry. Co. v. Botsford.**⁹¹—In this case Justice Gray says, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or submit it to the touch of a stranger, without lawful authority, is an indignity, an as-

83 Am. St. Rep. 269, 52 L. R. A. 328; Joliet St. Ry. Co. v. Call, 143 Ill. 177, 32 N. E. R. 389; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. R. 860; McQuigan v. Del., etc., Ry. Co. 129 N. Y. 50, 29 N. E. R. 235, 26 Am. St. Rep. 507, 52 L. R. A. 466.

90. Lyon v. Manhattan Ry. Co., 142 N. Y. 298, 37 N. E. R. 113, 25 L. R. A. 402; McGovern v. Hope, 63 N. J. L. 76, 42 Atl. R. 830.

90a. City of Ottawa v. Gilliland, 63 Kan. 169, 65 Pac. 252; Miami Turnpike Co. v. Bailey, 37 Ohio St. 104; Terre Haute & I. Ry. Co. v. Brunner, 128 Ind. 542.

91. 141 U. S. 250 (See Wigmore on Evid., vol. III, § 2220 for a scathing criticism of this decision.). See also, Camden & Suburban Ry. Co. v. Stetson, 177 U. S. 172.

sault and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." While this rule was followed for some time by the courts of several of the states, some of these courts, including the supreme court of Indiana, have repudiated it.

§ 14. **Same. Case of City of South Bend v. Turner.**⁹²—In this case, the court says that the cases establish the following propositions: "That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; that a defendant has no absolute right to demand the enforcement of such order but the motion thereof is addressed to the sound discretion of the court; that the exercise of such discretion is reviewable on appeal, and correctable in cases of abuse; that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important

92. 156 Ind. 418, 428, 60 N. E. R. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396.

facts which can only be disclosed, or fully elucidated by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding." The foregoing propositions are in accord with the views of the majority of the state courts and are believed to be sound.

§ 15. **Mode of examination.**—Ordinarily the examination takes place in the presence of one or more experts appointed by the court.⁹³ And ordinarily each party to the suit has one or more representatives present.⁹⁴ This is a matter, however, which rests in the discretion of the court. Where the examination is repulsive in its nature, or savors of indecency, persons not immediately concerned should be excluded.⁹⁵

§ 16. **Mode of enforcing the order.**—As stated in § 13, the order for the examination is usually enforced by dismissing the suit, and not by punishing the party directly for contempt of court.

93. *Richmond, etc., Ry. Co. v. Childress*, 82 Ga. 719; *Missouri Pac. Ry. Co. v. Johnson*, 72 Tex. 95.

94. *McGovern v. Hope*, 63 N. J. L. 76.

95. *Hale's P. C.*, 635.

It has been held, however, that a refusal to obey the court's order to submit to an examination is punishable directly.⁹⁶

§ 17. **When an examination should not be ordered.**—As previously stated, the question of granting or refusing an examination is a matter which rests in the sound discretion of the court.⁹⁷ Unless the ends of justice require it an examination should not be ordered.⁹⁸ Moreover, if it would tend to injure the party,⁹⁹ or impair his health,¹⁰⁰ it should be denied.

§ 18. **When the application for an examination should be made.**—The application for an examination should be made a reasonable time before the trial begins;¹ so as not to delay the trial,² or unduly prejudice the plaintiff.³ This is a question which depends upon the circumstances of the case, and rests in the sound discretion of the court. The day before the trial may be too late.⁴

96. *Schroeder v. Ry. Co.*, 47 Ia. 375, 376.

97. *Owens v. Kansas City, etc., Ry. Co.*, *supra*; *Alabama, etc., Ry. Co. v. Hill*, *supra*; *O'Brien v. La Crosse*, 99 Wis. 421, 75 N. W. R. 81, 40 L. R. A. 831.

98. *Gulf, etc., Ry. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. R. 703; *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. R. 1091.

99. *Boelter v. Ross Lumber Co.*, 103 Wis. 324, 79 N.W.R. 243.

100. *O'Brien v. La Crosse*, *supra*.

1. *Kansas Ry. Co. v. Michaels*, 57 Kan. 480; *Aspy v. Botkins*, 160 Ind. 170.

2. *Kinney v. Springfield*, 35 Mo. App. 97.

3. *Miami, etc., Turnpike Co. v. Baily*, 37 Ohio St. 104.

4. *Kinney v. Springfield*, *supra*.

On the other hand, the circumstances of the case may justify the granting of an application made after the trial begins.⁵

A request to submit to a voluntary examination should precede the application for a compulsory examination.⁶ Moreover, the application for a compulsory examination should be accompanied by an affidavit showing the necessity of such examination.⁷ And this affidavit must state facts sufficient to justify the examination and not merely allege that such an examination is necessary.⁸

It has been held that where the injuries are alleged to be permanent the *defendant* is entitled to have an examination made and an opinion of the surgeon given based thereon.⁹

§ 19. **Matters pertaining to the examination.**—The directions for conducting the examination should be contained in the court's order, and these directions should be strictly followed.¹⁰ The examination should not exceed the necessities of the case;¹¹ nor should it militate against

5. *Schroeder v. Chicago, etc., Ry. Co.*, 47 Ia. 381.

6. *Richmond, etc., Ry. Co. v. Childress*, *supra*.

7. *Terre Haute, etc., Ry. Co. v. Bruner*, 128 Ind. 542, 26 N. E. R. 178.

8. *Naab v. Stewart*, 32 N. Y. App. Div. 478, 52 N. Y. Suppl. 1094.

9. *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 554.

10. *Hess v. Lake Shore, etc., Ry. Co.*, 7 Pa. Co. Ct. 565.

11. *Lawrence v. Keim*, 19 Phila. (Pa.) 351.

12. *O'Brien v. La Crosse*, *supra*.

the person's health,¹² or subject him to indignities.¹³ Opiates and anaesthetics should not be resorted to, nor should the party be subjected to painful tests of any kind.¹⁴ The selection of the examiner is a matter which rests in the discretion of the court.¹⁵ The fact that the regular physician of the party has already made an examination will not preclude the court from ordering another examination by a disinterested physician.¹⁶

§ 20. Compulsory examination of the accused in a criminal case.—By the great weight of authority the accused, in a criminal case, may not be compelled to submit to an examination of his person.¹⁷ In England this rule is well settled.¹⁸ The basis of the rule in this country is the constitutional provision that a person accused of crime may not be compelled to furnish evidence against himself. A few courts, however, have

13. *Schroeder v. Chicago, etc., Ry. Co., supra*; *Sibley v. Smith, supra*; *McGovern v. Hope*, 63 N. J. L. 76, 42 Atl. 830.

14. *Schroeder v. Chicago, etc., Ry. Co., supra*; *Sibley v. Smith, supra*.

15. *Alabama, etc., Ry. Co. v. Hill, supra*.

16. *Alabama, etc., Ry. Co. v. Hill, supra*.

17. *People v. Mead*, 50 Mich. 228; *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72; *Day v. State*, 63 Ga. 667; *People v. McCoy*, 45 How. Pr. (N. Y.) 216 (examination of woman as to pregnancy); *McGinnis v. State*, 24 Ind. 500; *State v. Jacobs*, 5 Jones (N. C.) 259; *State v. Garrett*, 71 N. C. 87; *Spicer v. State*, 69 Ala. 159.

18. *Agnew v. Johnson*, 13 Cox Cr. Cas. 625, 19 Eng. Rep. 612 note.

taken the view that this constitutional provision has a restricted meaning, viz., that the accused may not be compelled to testify against himself, in the strict sense of the term.¹⁹ This view, however, as stated above, is not in harmony with the great weight of American authority, and contrary to the English rule.

§ 21. Compulsory examination of the complaining witness.—It has been held that in a criminal prosecution for assault the complaining witness may be compelled at the instance of the accused, to exhibit his injuries to the jury.²⁰ On the other hand, it has been held in a criminal prosecution for rape that the complaining witness may not be compelled, at the instance of the accused, to submit to an examination of her person by medical experts; that if such an examination is compellable at all it is a matter that rests in the discretion of the court.²¹

§ 22. Compulsory examination of the person in divorce cases.—Where impotency is alleged as the ground for a divorce the court may order a physical examination of the party. This rule is

19. *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530 (compelled to exhibit his bare arm to disclose the presence or absence of tattoo marks) and extended note; *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493 (compelled by officers to place his foot in given tracks); *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595.

20. *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25.

21. *King v. State*, 100 Ala. 85.

well settled both in England²² and in this country.²³ The court, however, will refuse to order an examination where the application seems to be made in bad faith.²⁴ Bishop says, "The parts concerned in this controversy being always properly concealed from public observation, if there was no method by which inspection could be compelled, justice would in many instances fail. Therefore, in England, Scotland, France and probably every other country where this impediment (impotency) to marriage is acknowledged, the courts have required the parties, when necessary, to submit their persons to such an examination. . . . The necessity for this proceeding is in our states precisely the same as in England whence our laws are derived. Consequently it is adapted to our situation and circumstances; and, within the established rules, it should be deemed a part of our unwritten law. . . . The result is that it is acknowledged in every state from which we have decisions, except Ohio, and it may well be deemed to be American doctrine."²⁵

§ 23. Mode of examination where impotency is alleged in divorce cases.—As said by Bishop, "In proper cases, to aid the proofs of impotence, the court appoints professional persons to examine the private parts of the parties and report to it whether or not the woman presents indications

22. Countess of Essex's Case, 2 How. St. Tr. 785, 803.

23. Anon., 89 Ala. 291.

24. Anon., 35 Ala. 226, 228.

25. Bishop on Mar. and Div. (6th ed.), vol. II., § 591.

of her having had connection with man. It requires them to submit to such examination. The examiners are under oath, and are *quasi* officers of the tribunal for that purpose. This is termed inspection of the person."²⁶

26. Bishop on Mar and Div. (6th ed.), vol. II., § 590.

CHAPTER II.

Experimental Evidence.

§ 1. **In general.**—The admissibility of experimental testimony is a matter which rests in the sound discretion of the court.¹ Where it furnishes the jury with material knowledge concerning the fact in issue, thereby tending to elucidate it, and thus aid the jury to reach a just and true verdict, such testimony should be admitted. But where it tends merely to establish or disprove a fact which is immaterial to the issue it should be excluded.² If it tends to corroborate a fact es-

1. Alabama Gt. So. Ry. Co. v. Collier, 112 Ala. 681, 14 So. R. 327 (allowed); Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81 (voice allowed); Hatfield v. St. Paul, etc., Ry. Co., 33 Minn. 130, 22 N. W. R. 176, 53 Am. Rep. 14 (walk; allowed); People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. R. 833 (allowed); State v. Lindoen, 87 Ia. 702, 54 N. W. R. 1075 (refused); Hardwick Sav. Bank, etc., Co. v. Drenan, 72 Vt. 438, 48 Atl. R. 645 (sticking postage stamps; refused).
2. Libby v. Scherman, 146 Ill. 540.

tablished by other evidence the court may allow or refuse it.³

§ 2. **Experiments made in the presence of the jury.** **Personal injury cases.**—Numerous instances are recorded of experiments before the jury. Thus, in an action for personal injuries occasioned by the plaintiff falling on a defective sidewalk, and which she alleged caused her to become paralyzed, it was held proper to allow her medical attendant, who had not been sworn, to demonstrate her loss of feeling to the jury by thrusting a pin into her side which she claimed was paralyzed.⁴ In another personal injury case it was held proper to allow the plaintiff to attempt to write his name and drink a glass of water in the jury's presence for the purpose of demonstrating the extent of his injuries.⁵ In another personal injury case the plaintiff, who claimed to have been permanently injured owing to the defendant's negligence was allowed to illustrate before the jury her power to use her arm, and the court of review held that such experiments were allowable and within the proper exercise of the trial court's discretion.⁶ And in another personal injury case, where the defendant claimed that the alleged injuries were owing to the displacement of a rail wrongfully loosened

3. *Stockwell v. Chicago, etc., Ry. Co.*, 43 Ia. 470; *Osborne v. Detroit*, 32 Fed. R. 36.

4. *Osborne v. Detroit*, *supra*.

5. *Clark v. Brooklyn Heights Ry. Co.*, 79 N. Y. Suppl. 811.

6. *Adams v. City of Thief River Falls*, 84 Minn. 30.

from the track by some evil-disposed person, and in support of its contention introduced the rail in court, which showed upon the outside of its bottom flange a scar which defendant claimed appeared to have been made by collision of the pony-truck wheel in front of the engine coming in contact with the flange of the rail as it lay diagonally across the track, the plaintiff in rebuttal was allowed to produce in court a wheel made to run on rails, and an iron rail, and was permitted to have a witness show the jury by use of the same the manner in which the wheel would come in contact with the rail under the circumstances claimed by the defendant to have existed. And the court of review held that they were not prepared to say that there was any error.⁷

§ 3. **Same. Cash register case. Cement case.**—In an action to recover the price of a cash register, where the vendee claimed the right to rescind his order for its shipment because it failed to register correctly, it was held proper to allow the agent who took the order to operate the register before the jury, and explain the principal upon which it worked.⁸ And in an action to recover the balance due for cement sold and delivered, where the defendant admitted the sale but set up that the cement was worthless, it was

7. *Leonard v. So. Pac. Co.*, 21 Ore. 555, 563.

8. *The Nat. Cash Register Co. v. Blumenthall*, 85 Mich. 464.

held proper to make tests out of the same stock before the jury.⁹

§ 4. **Same. Some criminal cases.**—In a burglary case a witness for the state was allowed to experiment with burglars' tools before the jury, and in so doing was allowed to use a cylindrical bar, which was not offered in evidence, in order to elucidate and illustrate clearly the character of the burglar's tools. In reviewing the case the supreme court held that the trial court did not err in allowing the use of the cylindrical bar, and furthermore, that the experiment before the jury was proper.¹⁰ In a capital case the court of review held that the practice of experiments before the jury, in this class of cases, for the purpose of illustrating whether a person could commit suicide by hanging upon a screw or hook inserted in a door, and leaving the door so experimented upon to be exhibited to the jury during the recess of the court, should be permitted with great caution.¹¹ In a case where the defendant was indicted for disturbing a religious congregation by his mode of singing, one of the witnesses, who was asked to describe the defendant's singing, was allowed to imitate it by singing a verse in the voice and manner of the defendant; and in so doing "produced a burst of prolonged and irresistible laughter, convulsing alike the spec-

9. *Hindry v. McPhee*, 11 Colo. 398.

10. *People v. Hope*, 62 Cal. 291, 295, 296.

11. *Jumpertz v. People*, 21 Ill. 375.

tators, the bar, the jury and the court.”¹² In another criminal case counsel for the defendants contended that he had a right to have the peculiarities of the defendant’s voice pointed out by the witness, and that for this purpose the voices themselves were competent to be introduced before the jury; but the trial court held otherwise, and the ruling was sustained by the higher court. “His manner of speaking being in question, there was no way of determining whether he would use his voice in the court room in his natural or in a constrained and simulated manner, the genuineness of the voice used not being supported by his oath.”¹³

§ 5. Experiments which tend to corroborate facts established by other evidence.—As stated in § 1, an experiment which tends merely to corroborate a fact established by other evidence may be allowed or refused by the court. Thus, in a personal injury case, it was held that the propriety of requiring the plaintiff to perform a physical act in the presence of the jury that would show the nature and extent of his injuries rests largely in the discretion of the court. And, furthermore, that where the uncontradicted evidence of several witnesses showed that, since receiving the injury complained of, the plaintiff was lame and limped when she walked, it was not error on the part of the trial court to re-

12. *State v. Linkhaw*, 69 N. C. 214, 12 Am. Rep. 647.

13. *Com. v. Scott*, 123 Mass. 222, 225, 234.

fuse to require her to walk across the court room in the presence of the jury.¹⁴

§ 6. **Experiments made out of court by the jury.**—Experiments made out of court by the jury should be made by authority of the court and under its supervision. Moreover, they should be made under substantially similar conditions to those which surrounded the transaction in question. Information acquired by the jury by experiments not authorized by the court, or acquired by experiments made under substantially different conditions, should not be considered in reaching a verdict. And the fact that the jury are advised to the contrary by counsel is immaterial. Thus, in a criminal case, counsel for the defendant, in the course of his argument to the jury after the close of the evidence, told them that they had a right to try for themselves whether worn-out boots, like those described by the witnesses for the state, would make such tracks in the dust or sand as they described; and advised the jury to make the experiment. Several members of the jury accordingly made the experiment out of court, in the absence of the defendant, and without obtaining authority from the court. And it was held by the higher court that this was such misconduct as invalidated the verdict; and that the defendant was not precluded from alleging it as ground for a new trial by the fact that it was done at the instance of his

14. *Smith v. St. Paul City Ry. Co.* 32 Minn. 1.

counsel.¹⁵ Again, in an action for personal injuries occasioned by a collision of the plaintiff's team with the defendant's car, a new trial was granted on the ground of misconduct of one of the jurors, before whom the case was tried, in going alone to view the premises where the accident occurred, after the arguments had been made and before the charge was given, and making inquiries there concerning the accident. "The knowledge thus acquired may have had a strong tendency to influence the juror's mind in agreeing to the verdict rendered."¹⁶ And in a murder case, in which the defense was that the deceased committed suicide, a pistol was shown to the jury and identified as the one sold to the prisoner; but it was not proved to be the one that was found near the deceased, and by which means he undoubtedly came to his death. The pistol shown to them, however, was sent to the jury-room after the jury retired without the knowledge of the prisoner, his counsel or the court; and they experimented with it with the view of judging whether, under the circumstances proven, the deceased could have shot himself with that weapon. The jury returned a verdict of guilty; and it was held that because the pistol which had not been properly identified as the one by means of which the deceased was killed was allowed to go to the jury without the prisoner's consent, a new trial should have been grant-

15. *The State v. Sanders*, 68 Mo. 292.

16. *Harrington v. Worcester, etc., Ry. Co.*, 157 Mass. 579, 583.

ed.¹⁷ On the other hand, in an action against a railroad company for wrongfully causing the death of a person by the running of a train of its cars at an unusual and dangerous rate of speed, without proper signals, at a crossing over a public and much-traveled street in a city, the defendant was permitted, at its request, with the consent of the plaintiff, and in pursuance of an order of court procured by it, to make experiments in the presence of the jury, by the running of a train over the crossing where the plaintiff's intestate was killed, and under conditions practically the same as those which existed when the accident occurred, for the information of the jury as to the nature and cause of the accident; and the court held that the information so obtained was competent evidence for the consideration of the jury.¹⁸

§ 7. **Experiments made out of court by witnesses.**—The admissibility of this class of testimony also rests largely in the sound discretion of the court. When the experiments are made under substantially similar conditions to those surrounding the transaction in question, and the testimony tends to enlighten the jury, rather than to confuse them, it should be admitted. As a general rule, this class of testimony is supplemented with the testimony of experts; but this is not essential to its admissibility.

17. *Yates v. The People*, 38 Ill. 527.

18. *Schweinfurth, Admr. v. The C. C. C. & St. L. Ry. Co.*, 60 Ohio St. 215.

§ 8. **Same. Experiments by experts.**—In a tort action for injuries to the plaintiff's house and fence, alleged to have been caused by the fumes, vapors and gases, escaping from the defendants' copperas works, which were in close proximity to an open sewer maintained by the city, and to piles of filth dug from it and laid on its banks, from which foul gases emanated, the plaintiff's experts were allowed to give the grounds and reasons of their opinions, including the details of experiments made by them elsewhere than on the premises in question, under conditions and circumstances which were as nearly as possible like those surrounding the plaintiff's house, in the absence of the sewer, and the higher court held that the defendant had no ground of objection.¹⁹ In an action against a railway company to recover for injuries to a child upon its track, testimony of an expert, made by a witness about a month after the accident, with the view of determining how far one could be seen from the point of injury, was held incompetent. In this case the court says: "we are of opinion that such evidence will not furnish, or aid in furnishing, a safe guide to the jury in the determination of the question whether the engineer exercised reasonable care to prevent the injury, after he discovered the plaintiff's peril, or even before such discovery, if that were an issue in the cause. The conditions are too variant."²⁰ On the other hand,

19. *Eidt v. Cutter*, 127 Mass. 522.

20. *Alabama Gt. So. Ry. Co. v. Burgess*, 114 Ala. 587, 596.

where the question is, whether the train in a given case could have been stopped after deceased could have been seen by the engineer, evidence of tests made by the defendant under similar circumstances has been held admissible, even where the tests were made in the absence of the plaintiff. "Instances are without number where, pending litigation, the parties have made test measurements and trials relating to facts in dispute, and they have been regarded as competent, and a quite satisfactory class of evidence upon questions of fact."²¹ In a murder case, a physician was called as an expert to show the effect of powder marks where a pistol is fired at short range, and it was held that his testimony, and the cloth or muslin used in his experiments, were admissible.²² And in another murder case, where the deceased was shot, a gunsmith, who had studied and experimented for years to ascertain how far guns and muskets would carry shot compactly, was held competent to state how far from the musket used a person receiving such a wound as the deceased received would have been.²³ As said in one case "It has been quite a common thing, in cases of homicide, to make experiments with firearms to determine the carrying distance, the

21. *Burg. v. C. R. I. & P. Ry. Co.*, 90 Ia. 106, 117; *Byers v. Railroad*, 94 Tenn. 345.

22. *Sullivan v. Com.*, 93 Pa. St. 284. See also, *Boyd v. State*, 14 Lea (Tenn.) 161; *Thrawley v. State*, 153 Ind. 375.

23. *State v. Asbell*, 57 Kan. 398; *Sullivan v. Com.* 93 Pa. St. 297.

penetrating force, and the distance to which fire will be carried by firearms of certain pattern and calibre, and to prove the results of such experiments at the trial, as tending to show the guilt or innocence of the accused.”²⁴

§ 9. Evidence of experiments to corroborate or explain opinion evidence.—Where an expert gives expert opinion evidence based upon experiments, it has been held that testimony of the details of the experiments may be restricted to the cross-examination. Thus, a professor in Dartmouth College who had testified to the state of the weather at a given time and place, and to his opinion of the effect of such weather upon a given substance, as deduced from many experiments, was not allowed to give the details of the experiments upon his direct examination; and the appellate court held that the details of the experiments were rightly excluded. They also said, “Upon cross-examination, to test his accuracy, the court would doubtless open, to some extent, the inquiry as to the nature and character of the tests used; but even this would be regulated by its discretion.”^{24a} It has been frequently held, however, that an expert may give his reasons for his opinion upon his direct examination, as well as the opinion itself. The jury may then be enabled to perceive the force of his reasoning, the soundness of his logic, and therefore judge of his capacity to give an opinion on the subject,

24. *People v. Levine*, 85 Cal. 39.

24a. *Ingledew v. Northern Railroad*, 7 Metc. (Mass.) 86, 91.

the correctness of his conclusions and consequently the weight due to his opinion.²⁵ If testimony of the details of the experiments is to be restricted to the cross-examination it would rarely be given at all. For, as stated in one decision, "If the reasons on which the intelligent opinion of an expert is founded can only be furnished to the jury by cross-examination, this case makes it evident that as wise a counselor as the plaintiff's would never give aid and comfort to his adversary by such a cross-examination."²⁶

§ 10. **Evidence of experiments by non-experts.**—It has been frequently said that *real* opinion evidence may be given only by an expert. Testimony, however, which in *form* is assertion of opinion, but which in a *substantial sense* is assertion of fact, may be given by a non-expert. And "Spontaneous conclusions, as to conditions or appearances, drawn from perceptions resulting from a variety of circumstances which cannot be palpably described by the witness to the jury so as to enable that body to draw intelligent conclusions from them, are usually regarded, from the legal standpoint, as matter of fact and not of opinion."²⁷ Moreover, not only may a non-expert give testimony of matter of fact, which in form

25. *Lewiston Steam Mill Co. v. Androscoggin Water Power Co.*, 78 Me. 74; *Hawkins, et al. v. City of Fall River*, 119 Mass. 94.

26. *Lewiston Steam Mill Co. v. Androscoggin Water Power Co.*, *supra*.

27. *Connecticut, etc., Life Ins. Co. v. Lathrop*, 111 U. S. 612.

may be opinion, but he also may give testimony of experiments made by him upon which the former testimony is based. As said in one case, "A non-expert, shown to be familiar with evidentiary facts, may, when the expression of an opinion is not involved, ordinarily state the result of his observations with reference to such facts. An ordinary non-professional witness in possession of his faculties, who takes a section from the stomach of a horse and feeds it to a hen, which dies in ten minutes after eating the same, may testify to such facts, when material, for the same are as observable to him as to a professional witness."²⁸

§ 11. **Experiments made with bloodhounds.**—The decisions pertaining to the admissibility of testimony of experiments made with bloodhounds, as regards trailing an accused person, are comparatively few. Moreover, the few there are do not agree. Some hold that such testimony, under proper conditions, is admissible. Thus, Cockrell, J., says, "Testimony was admitted, over the defendant's objection, as to the action of the two dogs in following the supposed trail of the burglar from the scene of the crime. . . . The adjudged cases on this point are few, but uniform in admitting such evidence under proper conditions."²⁹ On the other hand, Sulli-

28. *State v. Isaacson*, 8 S. Dak. 69 (In this case the defendant was charged with killing a horse by maliciously putting poison within its reach).

29. *Davis v. State*, 46 Fla., 137, 35 So. R. 76.

van, C. J., says, "That the conclusions of the bloodhound are generally too unreliable to be accepted as evidence in either civil or criminal cases is, we believe, the teaching of that common knowledge and ordinary experience which we may rightfully bring to the examination of this subject. . . . It is unsafe evidence, and both reason and instinct condemn it."³⁰

Those courts which admit this class of testimony require that the bloodhounds be of pure breed, and be trained to track human beings. As said in a Kentucky case, "evidence as to the trailing with a bloodhound of one accused of crime is admissible to connect him therewith only when it is shown by someone having personal knowledge of the fact that the dog is of pure breed, and of a stock characterized by acuteness of scent and power of discrimination; that he is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings; that such dog was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him."³¹

Where the bloodhounds of pure breed have been tried and found wanting it is not error for the court to exclude testimony of experiments

30. *Brott v. State*, 70 Neb. 395, 97 N. W. R. 593.

31. *Pedigo v. Com.*, 103 Ky. 41, 82 Am. St. Rep. 566.

made by putting them on the trail of the accused person. As said by McClellan, J., "The court properly excluded from the jury the proposed evidence as to two bloodhounds of the same breed as those employed to track the supposed criminal in this case, and trained by the same man, being put upon the trail of a human being, and leaving it to trail a sheep which they overhauled and killed. The test by comparison was not sufficiently certain to determine the reliability of the dogs employed here by reference to the quality of the other dogs."³²

§ 12. **Some miscellaneous illustrations of experiments.**—An expert, in testifying to handwriting, may illustrate his testimony by the use of a blackboard.³³ In an action against a railway company for the value of cattle killed at a crossing by being struck by a train, evidence of experiments to determine how far a train, coming towards the crossing, could be seen from the highway, is admissible on the question of contributory negligence on the part of the person who was in charge of the cattle when they were struck.³⁴ Refusing to allow the jury to observe experiments with cars out of the court room is not prejudicial error.³⁵ In a murder case, where the deceased was killed with buckshot fired from

32. *Sinmsom v. State*, 111 Ala. 6, 20 So. R. 572.

33. *McKay v. Lasher*, 121 N. Y. 477; *State v. Henderson*, 29 W. Va. 147.

34. *Elgin, J. & E. Ry. Co. v. St. Reese*, 70 Ill. App. 463.

35. *Smith v. St. Paul Ry. Co.*, 32 Minn. 1.

a gun, and where there was evidence that the defendant's gun scattered low-mould buckshot badly, but which the defendant denied, the refusal of the court to allow the defendant to shoot off the gun outside the court room, in the presence of a deputy marshall, was not prejudicial error. "The granting or refusal of such request, first made in the midst of the trial, was clearly within the discretion of the court."³⁶ In a criminal action for maliciously shooting another, in which the complaining witness testified that he identified the defendant by the light of the pistol's flash while looking through a glass window, evidence of experiments subsequently made at the place by several witnesses, with the view of determining whether the complaining witness could have seen the defendant or not at the time of the shooting, was held admissible.³⁷ In an arson case, testimony as to the length of time certain candles would burn was material to the issue; and testimony of experiments with candles to determine this fact held admissible.³⁸ A refusal by the trial court to allow exhibitions of spiritualistic powers is not prejudicial error.³⁹ Where the handwriting of a person is material to the issue in a civil case, it is not prejudicial error for

36. *United States v. Ball*, 163 U. S. 673.

37. *Smith v. State*, 2 Ohio St. 512.

38. *People v. Levine*, 85 Cal. 39.

39. *United States v. Reid*, 42 Fed. R. 134. See also, the interesting articles by Irving Browne, 5 Green Bag, 131, 185, 222.

the trial court to compel an exhibition of his handwriting before the jury.⁴⁰ But it has been held prejudicial error for the trial court to refuse to allow an expert on cross-examination to exhibit to the jury the effect on the color of ink, caused by the use of a blotter.⁴¹

Where a passenger is injured by the derailment of a street car at a curve, alleged to have been caused by the excessive speed of the car when entering the curve, evidence of experiments conducted under similar conditions for the purpose of determining whether the car would leave the track at the same curve when running at its maximum speed is admissible.⁴² In an action for injuries to a passenger by the sudden starting of the train before he has time to alight, testimony of a subsequent test to determine the length of time that the engineer probably took to oil his engine at the point in question on the occasion of the accident is admissible.⁴³ In an action for the negligent killing of a person by a railroad train, testimony as to experiments made at the same place, tending to show how far a man could be seen down the track, is admissible.⁴⁴ To render testimony of experiments admissible,

40. *Smith v. King*, 62 Conn. 515, 26 Atl. R. 1059; *Huff v. Nims*, 11 Neb. 363; *King v. Donahue*, 110 Mass. 155, 14 Am. Rep. 589; *Williams v. Riches*, 77 Wis. 569.

41. *Farmers' Bank v. Young*, 36 Ia. 451.

42. *Cheetham v. Union Ry. Co.*, 26 R. I. 279, 58 Am. Rep. 881.

43. *O'Dea v. Mich. Cent. Ry. Co.*, 142 Mich. 265, 12 Det. Leg. N. 718, 105 N. W. R. 746.

44. *Cox v. Norfolk & C. Ry. Co.*, 126 N. C. 103, 35 S. E. R. 237; *Young v. Clark*, 16 Utah 42, 50 Pac. R. 832.

they must be made under essentially the same conditions as attend the subject of inquiry; and before receiving such testimony the court must determine on a proper showing, that the conditions on the two occasions are *prima facie* essentially the same.⁴⁵ Thus, in an action for negligently causing the death of a passenger by being thrown from a street car as it rounded a curve, testimony as to the experiments subsequently made with the same car, running thru the same curve, where the conditions were not similar to those existing at the time of the accident, though more favorable to the decedent's case, is inadmissible.⁴⁶

45. *Zimmer v. Fox River Val. Elec. Ry. Co.*, 123 Wis. 643, 101 N. W. R. 1099.

46. *Halverson v. Seattle Elec. Co.*, 35 Wash. 600, 77 Pac. R. 1058.

PART IV.

Documentary Evidence.

CHAPTER I.

Modes of Proving Various Documents.

§ 1. **In general.**—A document has been defined as “any substance having any matter expressed or described upon it by marks capable of being read.”¹ Documents are usually classified as public and private. Public documents, as regards their character, are subdivided into judicial and non-judicial; and as regards their mode of proof into those of record and those not of record.

Judicial documents are subdivided into three classes. The first subdivision includes judgments, decrees and verdicts. The second subdivision includes depositions, inquisitions and examinations. And the third subdivision includes warrants, writs, pleadings, etc.

Chapter X of Part II, of this book deals with the subject of Public Documents. The subject, however, is still further discussed in the present chapter.

§ 2. **Mode of proving public documents.**—Public documents, including public records, may be proved by introducing in evidence the documents themselves, or duly authenticated copies

1. Steph. Evid., art I.

thereof.² And the mere fact that the removal of the original records was improper does not render them incompetent.³

§ 3. Mode of proving state statutes.—As regards public state statutes, the courts of the state are bound to judicially notice them. They are read in court, however, not as evidence, but to refresh the judge's memory.⁴

Private statutes, however, must be proved. They must also be embodied in the record or bill of exceptions.⁵ In some states, however, the courts are required to judicially notice private as well as public statutes.⁶ The mode of proving private statutes, at common law, is by sworn copies, or by exemplified copies authenticated by the great seal.⁷ In many of the states, however, there are statutes which provide that legislative enactments, both private and public, may be proved by books containing the statutes, and which are published by legislative authority.

§.4. Mode of proving federal statutes.—What are known as the revised statutes of the United States, and which constitute a revision and con-

2. *Reed v. Arnold*, 10 Kan. 102; *Anderson v. Ackerman*, 88 Ind. 481; *Stevenson v. Moody*, 85 Ala. 33, 4 So. R. 595.

3. *Priou v. Adams*, 5 Mart. U. S. (La.) 691.

4. *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475.

5. *Hanley v. Donoghue*, 116 U. S. 1; *Osborn v. Blackburn*, 78 Wis. 209.

6. *Farmers' Bank v. Jarvis*, 1 Monroe (Ky.) 4; *Junction Ry. Co. v. Bank of Ashland*, 12 Wall. (U. S.) 226.

7. *Rex v. Forsyth*, Russ. & R. 275.

solidation of the federal statutes in force December 1, 1873, and also the federal statutes enacted between that date and the year 1878, are admissible as evidence in all the federal and the state courts. And copies of acts of congress passed since then, printed by the authority of congress, are also admissible as evidence in all the federal and the state courts.⁸

§ 5. **Mode of proving ordinances.**—The ordinances of a city are usually proved by introducing in evidence books or pamphlets, published by municipal authority, and which purport to contain the ordinances of the city. They are usually made *prima facie* evidence of the ordinances contained in them, either by charter or the general law. Some courts hold that such books or pamphlets, to be admissible, must expressly show that they were published by authority.⁹ Other courts, however, hold that this is not essential.¹⁰ Where the law requires that official books or records be kept, and they are produced from the proper custody, they are admissible in evidence even when they are not expressly made admissible by statute.¹¹ In many of the states

8. United States Rev. Statutes, 1878, Appendix, pp. 1091-1092.

9. Quint v. Merrill, 105 Wis. 406, 81 N. W. R. 664; Wapella v. Davis, 39 Ill. App. 592.

10. Holly v. Bennett, 46 Minn. 386, 49 N. W. R. 189.

11. Jackson v. Kansas City, etc., Ry. Co., 157 Mo. 621, 58 S. W. R. 32, 80 Am. St. Rep. 650; Rutherford v. Swink, 90 Tenn. 152, 16 S. W. R. 76; Selma St., etc., Ry. Co. v. Owen, 132 Ala. 421, 31 So. R. 598.

a municipal ordinance may, by statute, be proved by certified copy of it under the corporate seal.¹² Where no book is provided for recording the ordinances, and they are merely placed on file by the register, certified copies of them, as well as the original ordinances, are admissible in evidence.¹³ That given ordinances were properly adopted may be proved by the minutes of the common council kept by the clerk.¹⁴ To render books or pamphlets, which purport to contain ordinances, admissible in evidence, it is not essential that they be attested, or under seal.¹⁵ Where the records of a suit are transferred to another court a transcript of the records is not essential. The original records in such case are admissible.¹⁶ To render ordinances admissible it is not essential to prove that they were published.¹⁷

§ 6. Mode of proving judgments and other judicial records and proceedings.—A judgment, or any other judicial record, is provable in the same court in which it is entered by introducing in

12. *St. Louis v. Foster*, 52 Mo. 513; *Lindsay v. Chicago*, 115 Ill. 120, 3 N. E. R. 443; *Florida Cent., etc., Ry. Co. v. Seymour*, 44 Fla. 557, 33 So. R. 424.

13. *Troy v. Atcheson, etc., Ry. Co.*, 11 Kan. 519.

14. *Kennedy v. Newman*, 1 Sandf. (N. Y.) 187.

15. *St. Louis v. Foster*, *supra*.

16. *Greer v. Greer*, 109 N. C. 679, 14 S. E. R. 297.

17. *Larkin v. Burlington, etc., Ry. Co.*, 85 Ia. 492, 52 N. W. R. 480.

evidence the original record itself.¹⁸ A judicial record is provable in another court by a certified copy of the record, by an exemplified copy, or by a sworn copy. It is also provable by the original record, properly verified, even when the removal of the original record is improper.¹⁹

All judicial proceedings which legitimately constitute a part of the record, including the pleadings, entries, etc., are provable in the same manner as the judgment itself.²⁰

§ 7. Admissibility of docket entries, executions, etc.—The admissibility of docket entries, executions and other original papers, depends upon the circumstances of the case. Where a formal record of docket entries is not required by law the docket entries are admissible.²¹ Moreover, many courts hold that where they have not been fully extended on the records they are admissible;²² even when a certified copy of them may be produced.²³ On the other hand, some

18. *State v. Logan*, 33 Md. 1; *Sawyer v. Garcelon*, 63 Me. 25; *Clink v. Thurston*, 47 Cal. 21.

19. *Stevison v. Earnest*, 80 Ill. 513; *People v. Alden*, 113 Cal. 264.

20. *Knapp v. Miller*, 133 Pa. St. 275, 19 Atl. R. 555; *State v. Hawkins*, 81 Ind. 486; *Dominick v. Randolph*, 124 Ala. 557, 27 So. R. 481; *Gregory v. Pike*, 94 Me. 27, 46 Atl. R. 793.

21. *Emery v. Whitwell*, 6 Mich. 474; *Com. v. Bolkom*, 3 Pick. (Mass.) 281.

22. *Davis v. Smith*, 79 Me. 351, 10 Atl. R. 55; *Pruden v. Alden*, 23 Pick. (Mass.) 184, 34 Am. Dec. 51; *Gay v. Rogers*, 109 Ala. 624, 20 So. R. 37.

23. *Luce v. Dexter*, 135 Mass. 23.

courts hold that where they constitute mere memoranda they are not admissible.²⁴ Moreover, where a judgment has been formally recorded it constitutes the best evidence, and the docket entries are inadmissible as primary evidence.²⁵ They may, however, be admissible in such cases as secondary evidence, after a proper foundation has been laid for the introduction of this class of testimony.²⁶

Writs of execution, as well as other writs, when properly filed, constitute part of the record, and may be proved in the same manner as a judgment.²⁷ The same is true of a return made by a sheriff.²⁸ But bills of exception do not constitute such a part of the record as renders them provable by the record.²⁹ Their sole function is to certify to a higher tribunal the facts embodied in them in order that this court may revise the

24. *Steele v. Steele*, 89 Ill. 51; *State v. Baldwin*, 62 Minn. 518, 65 N. W. R. 80.

25. *Baxter v. Pritchard*, 113 Ia. 422, 85 N. W. R. 633; *Waterbury Lumber, etc., Co. v. Hinckley*, 75 Conn. 187, 52 Atl. R. 739; *Goggans v. Myrick*, 131 Ala. 286, 31 So. R. 22.

26. *Ayers v. Roper*, 111 Ala. 651, 20 So. R. 460; *Ellis v. Huff*, 29 Ill. 449.

27. *Ellis v. Huff*, *supra*; *State v. Lang*, 63 Me. 215.

28. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. R. 625, 75 Am. St. Rep. 811; *Brewster v. Vail*, 20 N. J. L. 56, 38 Am. Dec. 547. See also, *Kimmel v. Meier*, 106 Ill. App. 251 (indorsement by sheriff on execution that land was sold not the office of the return).

29. *State v. Hawkins*, 81 Ind. 486; *O'Neill v. Calhoun*, 67 Ill. 219.

proceedings of the lower court. Ordinarily an execution should be accompanied by the judgment upon which it is based.³⁰ There are, however, exceptions to this rule.³¹

§ 8. Records of courts of justices of the peace.

—Records of courts of justices of the peace are admissible in evidence when properly authenticated and proved, whether required by statute to be kept or not.³² It has been held that a justice's docket, kept as a complete record of the proceedings, is admissible in evidence without producing the original papers.³³ It also has been held that the minutes of the proceedings are not admissible in lieu of a formal record where it is not necessary to receive them.³⁴ On the other hand, they have been held admissible where the justice died before making a formal record.³⁵ Where the law requires that a docket be kept it is admissible to prove only those matters which are authorized or required to be kept.³⁶ When used in the same court a justice's docket is evi-

30. *Vassault v. Austin*, 32 Cal. 597; *Wilson v. Conine*, 2 Johns. (N. Y.) 280; *Ramsey v. Waters*, 1 Mo. 406.

31. *Deloach v. Myrick*, 6 Ga. 410; *Spoor v. Holland*, 8 Wend. (N. Y.) 445, 24 Am. Dec. 37.

32. *People v. Ham*, 73 Ill. App. 533; *Knapp v. Miller*, 133 Pa. St. 279, 19 Atl. R. 555; *Church v. Pearne*, 75 Conn. 350, 53 Atl. R. 955; *Chapman v. Dodd*, 10 Minn. 350.

33. *Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. R. 447.

34. *Strong v. Bradley*, 13 Vt. 9.

35. *Story v. Kimball*, 6 Vt. 541.

36. *Armstrong v. State*, 21 Ohio St. 357; *Brown v. Pearson*, 8 Mo. 159.

dence *per se*;³⁷ but when used in another court it must be authenticated.³⁸ The record itself is not sufficient proof of its identity and authenticity.³⁹ The proof may be given by the justice himself,⁴⁰ or by some other competent witness.⁴¹ Where the former proceedings were before two justices and signed by both, they may be proved by only one of them.⁴² Moreover, where the purpose of introducing the evidence is merely to prove the existence of the records, and not their contents, it may be given by anyone who has personal knowledge of this fact.⁴³ In California a justice's docket is admissible by statute.⁴⁴

· § 9. **Records of courts of probate.**—Courts of probate are courts of record; and all matters within the jurisdiction of the court, and which are required to be recorded, may be proved by the records.⁴⁵ The matters contained in them may be proved either by introducing in evidence the original records, certified copies of them, or sworn copies. Where the purpose in offering them in evidence is to prove the appointment of

37. *Smith v. Frost*, 5 Hill (N. Y.) 431.

38. *State v. Voight*, 90 N. C. 741.

39. *Wentworth v. Keizer*, 33 Me. 267; *Bridges v. Branam*, 133 Ind. 488, 33 N. E. R. 271.

40. *Hickman v. Griffin*, 6 Mo. 37.

41. *State v. Chambers*, 70 Mo. 625.

42. *Scott v. McCrary*, 1 Stew. (Ala.) 315.

43. *Phelps v. Hunt*, 43 Conn. 194.

44. *Beardsley v. Frame*, 85 Cal. 134, 24 Pac. R. 721.

45. *Cox v. Cody*, 75 Ga. 175; *Worthington v. Dunkin*, 41 Ind. 515.

an administrator, the fact that letters of administration exist is immaterial.⁴⁶

§ 10. **Mode of proving the statutes of sister states.**—The courts of one state do not take judicial notice of the laws of a sister state. When material to the issue they must be proved as matters of fact.⁴⁷

The United States constitution provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and it authorizes congress to prescribe the mode by which they shall be proved.⁴⁸ Pursuant to the authority thus vested in congress, a general statute was enacted which provides that acts of the legislature of any state or territory or of any country, subject to the jurisdiction of the United States, shall be authenticated by having the seal of such state, territory or country affixed thereto.⁴⁹ The seal in such case imports absolute verity; and is presumed to have been annexed by the person having the custody thereof and authorized to do the act.⁵⁰ The federal statute also provides that

46. *Davis v. Turner*, 21 Kan. 131; *Knapp v. Miller*, 133 Pa. St. 275, 19 Atl. R. 555.

47. *Shed v. Augustine*, 14 Kan. 282; *Railway Co. v. Stone* 174 Mo. 1, 73 S. W. R. 453; *Washburn-Crosby Co. v. Railway Co.*, 180 Mass. 252, 62 N. E. R. 590; *Eastern Bldg. & Loan Assoc. v. Williamson*, 189 U. S. 122.

48. U. S. Const., art. 4, § 1.

49. U. S. Rev. Stat., § 905, U. S. Comp. Stats. 1901, p. 677.

50. *United States v. Johns*, 4 Dall. (U. S.) 916; *United States v. Amedy*, 11 Wheat. (U. S.) 392.

it shall be applicable to the federal courts as well as to the state courts. Although this statute is mandatory in form it is not compulsory. Generally, where the proof conforms to the laws of the state in which the cause is tried it is sufficient, even although it does not conform to the provisions of the act of congress. In a few states, however, it has been held that the mode of proof must conform to the provisions of the act of congress.⁵¹ The more common mode, however, is to introduce printed volumes of the statutes of the sister states. In some states the courts require extrinsic evidence of the authenticity of the printed volumes;⁵² while in other states the courts do not.⁵³ Where the volumes are published as a private enterprise, and not by public authority, and their verity is questioned, the books are not admissible.⁵⁴ But those which are printed by public authority, and which contain the words "by authority" are *prima facie* admissible.⁵⁵ In most of the states there are laws which regulate the mode of proving the statutes of the sister states. These laws usually provide

51. *State v. Twitty*, 2 Hawkes (N. C.) 441, 11 Am. Dec. 779 and note.

52. *State v. Twitty*, *supra*; *Van Buskirk v. Mulock*, 18 N. J. L. 184; *Stanford v. Pruet*, 27 Ga. 243, 73 Am. Dec. 734; *Lord v. Staples*, 23 N. H. 448.

53. *Clanton v. Barnes*, 50 Ala. 260; *Bright v. White*, 8 Mo. 421; *Barkman v. Hopkins*, 11 Ark. 157.

54. *Clagett v. Duluth Tp.*, 143 Fed. R. 824.

55. *Cutter v. Wright*, 22 N. Y. 472; *Merrifield v. Robbins*, 8 Gray (Mass.) 150.

that the printed statutes of the sister states are admissible where it is shown that they are admitted in the particular state in which they were enacted, or purport to be printed by public authority.⁵⁶ Statutes, like other records, may also be proved by sworn copies.⁵⁷

§ 11. **Presumptions as to enactment.**—In the absence of proof to the contrary an enrolled public statute, or an act signed by the governor, deposited with the secretary of state, and published as a law, is presumed to be valid.⁵⁸ In such case all necessary formalities, such as passage by a constitutional majority;⁵⁹ taking vote by yeas and nays;⁶⁰ suspension of the rules;⁶¹ publication as required by law,⁶² etc., are presumed to have been performed.

In England, where there is no written constitution, parliament is supreme; and when an act of parliament is enrolled it is conclusively presumed to be valid and cannot be impeached.⁶³

56. *Bride v. Clark*, 161 Mass. 130; *Wilt v. Cutler*, 38 Mich. 189; *Eagan v. Connelly*, 107 Ill. 458; *Meracle v. Down*, 64 Wis. 323.

57. *Ennis v. Smith*, 14 How. (U. S.) 400.

58. *Detroit v. Detroit Board of Assessors*, 91 Mich. 78, 51 N. W. R. 787, 16 L. R. A. 59; *Erford v. Peoria*, 229 Ill. 546, 82 N. E. R. 374.

59. *People v. Chenango County*, 8 N. Y. 317.

60. *State v. Rogers*, 22 Oreg. 348, 30 Pac. R. 74.

61. *State v. Peterson*, 38 Minn. 143, 36 N. W. R. 443.

62. *Welch v. Battern*, 47 Ia. 147.

63. *Rex v. Jeffries*, Str. 446, 93 Eng. Reprint 626; *Rex v. Arundel*, Hob. 109, 80 Eng. Reprint, 258.

In that country a public act is enrolled by being copied on the roll of parliament; and a private act is enrolled by depositing it with the clerk of parliament.⁶⁴ In this country an act is enrolled when it is signed by the presiding officers of both houses of the legislature and deposited with the secretary of state.⁶⁵ In some states the courts hold that an enrolled act is conclusively presumed to be valid and cannot be impeached.⁶⁶ In other states the courts hold that there is only a *prima facie* presumption of its validity, and that evidence is admissible to show that it was not passed in due form and in harmony with constitutional provisions.⁶⁷

§ 12. **Mode of proving the common law.**—The usual mode of proving the common law of England is by expert testimony.⁶⁸ It is not essential that the expert be a lawyer or a jurist. He may be a stock broker,⁶⁹ a Roman Catholic bishop,⁷⁰

64. *Weeks v. Smith*, 81 Me. 538, 18 Atl. R. 325.

65. *Weeks v. Smith*, *supra*.

66. *Harwood v. Wentworth*, 4 Ariz. 378, 42 Pac. R. 1025, 162 U. S. 547; *Fouke v. Fleming*, 13 Md. 392 (This case holds that the enrolled act is better evidence of the subject matter of a statute than the journals of both houses).

67. *Ex Parte Kelly*, 153 Ala. 668; *Illinois Cent. Ry. Co. v. People*, 143 Ill. 434, 33 N.E. R. 173, 19 L. R. A. 119; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. R. 670.

68. *Barber v. Hildebrand*, 42 Neb. 400, 60 N. W. R. 594; *Ennis v. Smith*, 14 How. (U. S.) 400.

69. *Vander Douckt v. Thellusson*, 8 C. B. 812.

70. *Sussex Peerage Case*, 11 Clark & F. 134; *Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. R. 57.

etc., provided he is sufficiently conversant with the law involved in this issue.

The common law of a sister state may also be proved by expert testimony. In many states there are statutes which provide that it may be proved by the authorized printed reports of decisions; and in a few states this mode of proof has been upheld in the absence of statutes.⁷¹

§ 13. Mode of proving statutory foreign law.—A statutory foreign law may be proved by a properly authenticated copy, by an examined copy verified under oath, or by an exemplified copy under the great seal of the state. As said by the supreme court of the United States, "foreign statutes may be verified by an oath, or by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by the certificate of an officer, properly authorized by law to give the copy, which certificate must be duly proved."⁷²

§ 14. Printed volumes of statutes of sister states.—Although congress has prescribed the mode in which the statutes of a state shall be proved,⁷³ printed volumes of statutes of sister states, published by authority, are admissible to

71. *Ely v. James*, 123 Mass. 36; *Brush v. Scribner*, 11 Conn. 388, 29 Am. Dec. 303.

72. *Emmis v. Smith*, 14 How. (U. S.) 400. See also note 113 Am. St. Rep. 883.

73. U. S. Rev. Stat. (1878), § 905, U. S. Comp. Stat. (1901) 677.

prove those statutes.⁷⁴ Unauthorized editions printed by private persons are usually inadmissible;⁷⁵ even where they contain a printed certificate of the secretary of state that they are correctly transcribed.⁷⁶ In some states parol evidence is inadmissible to prove the statutes of a sister state;⁷⁷ while in other states expert testimony has been held admissible to prove their existence and meaning.⁷⁸

§ 15. **Admissibility of legislative journals.**—In some states legislative journals are not admissible to impeach either the contents⁷⁹ of an enrolled statute, or the validity of its passage.⁸⁰ In those states the enrolled act is considered conclusive. This is owing to the fact that the certificate of the presiding officers of the two houses is treated as the best evidence that constitutional

74. *Eagan v. Connelly*, 107 Ill. 458; *Wilt v. Cutler*, 38 Mich. 189; *Clanton v. Barnes*, 50 Ala. 260.

75. *Packard v. Hill*, 2 Wend. (N. Y.) 411; *Magee v. Sanderson*, 10 Ind. 261.

76. *Goodwin v. Provident Sav. Loan Assur. Assoc.*, 97 Ia. 226, 66 N. W. R. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

77. *Zimmerman v. Helser*, 32 Md. 274; *Comparet v. Jernegan*, 5 Blackf. (Ind.) 375. See also *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49 (In this case the testimony of a policeman and constable of New Jersey was held inadmissible to prove the statutes of that state.).

78. *Raynham v. Canton*, 3 Pick. (Mass.)-293; *Chattanooga, etc., Ry. Co. v. Jackson*, 86 Ga. 676, 13 S. E. R. 109.

79. *Fouke v. Fleming*, 13 Md. 392; *Mason v. Cranbury Tp.*, 68 N. J. L. 149, 52 Atl. R. 568.

80. *Hovey v. State*, 119 Ind. 395, 21 N. E. R. 21; *People v. Burt*, 43 Cal. 560; *Harwood v. Wentworth*, 162 U. S. 547.

requirements have been met;⁸¹ and the further fact that admitting the journals would give rise to much confusion and uncertainty as to the validity of the statute.⁸² In other states there is a *prima facie* presumption that the enrolled act filed with the secretary of state was passed in due form; but the presumption is not conclusive.⁸³

§ 16. Formalities prescribed by federal statute for proving judicial records of sister states.—In 1790 congress passed an act which provides that the records and judicial proceedings of the courts of any state or territory or of any country subject to the jurisdiction of the United States shall be proved and admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form. The act also provides that the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.⁸⁴ By this

81. See cases cited in foot-note 80.

82. *Weeks v. Smith*, 81 Me. 538, 18 Atl. R. 325; *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *Pangborn v. Young*, 32 N. J. L. 29.

83. *Illinois Cent. Ry. Co. v. People*, 143 Ill. 434, 33 N. E. R. 173, 19 L. R. A. 119.

84. U. S. Rev. Stat. (1878), § 905, U. S. Comp. Stat. (1901) 667.

federal statute the records and judicial proceedings of a court of another state or territory, when properly authenticated as provided by the statute, must be admitted.⁸⁵ A court of a sister state that has a presiding judge, a clerk and a seal, is presumed *prima facie* to be a court of record.⁸⁶ Moreover, its duly authenticated records are not only admissible to prove their contents, but also to show, *prima facie*, the jurisdiction of the court, both as to the parties to the suit and as to the subject matter.⁸⁷

§ 17. **Same. Requirements of statute as to attestation.**—The statute requires that the attestation by the clerk shall be in accord with the form that is used in the state from which the attested document comes. It does not prescribe the form of the attestation.⁸⁸ The sole proof that it is in accord with the form used in the state from which it comes is the certificate of the presiding judge. And this is conclusive.⁸⁹ It is not essential that the clerk's certificate show that the

85. *Taylor v. Heitz*, 87 Mo. 660; *Hornier v. Spelman*, 78 Ill. 206; *Friend v. Miller*, 52 Kan. 139, 34 Pac. R. 397, 39 Am. St. Rep. 340; *In re Ellis*, 55 Minn. 401, 56 N. W. R. 1053, 43 Am. St. Rep. 514, 23 L. R. A. 287.

86. *Hughes v. Harris*, 2 Ala. 269.

87. *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. R. 621, 36 L. R. A. 64; *Manning v. Hogan*, 26 Mo. 570; *Coughran v. Gilman*, 81 Ia. 442, 46 N. W. R. 1005.

88. *Simons v. Cook*, 29 Ia. 324; *White v. Strother*, 11 Ala. 720; *Grover v. Grover*, 29 Ia. 324.

89. Cases cited in foot-note 88.

court is a court of record.⁹⁰ Nor that he is custodian of the court records.⁹¹ The requirements of the federal statute are that the transcript of the record be attested by the clerk, that the seal of the court, if there be one, be annexed to it, and that the judge, chief justice, or presiding magistrate, certify that the clerk's attestation is in due form. But if the transcript is incomplete, or shows defects in the original record, it may be rejected.⁹²

§ 18. By whom the transcript may be attested.

—The statute prescribes that the attestation be made by the clerk; and the courts generally hold that an attestation by a deputy, or any other person acting as a substitute, is not valid.⁹³ It has been held, however, that an attestation by a deputy in the name of the clerk is valid.⁹⁴ The fact that a state statute provides that a deputy clerk may perform the duties of the clerk does not effect the general rule above stated.⁹⁵ Where the judge is also *ex-officio* clerk he may act in both capacities. In such case, however, he should

90. *The Thames v. Erskine*, 7 Mo. 213.

91. *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. R. 380, 26 Am. St. Rep. 877; *Kingman v. Cowles*, 103 Mass. 283.

92. *Shilling v. Seigle*, 207 Pa. St. 381, 56 Atl. 957; *West Feliciana Ry. Co. v. Thornton*, 12 La. Ann. 736, 68 Am. Dec. 778.

93. *Willock v. Wilson*, 178 Mass. 68, 59 N. E. R. 757; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83.

94. *Stemke v. Graves*, 16 Utah 293, 52 Pac. R. 386. See also, *Greasons v. Davis*, 9 Ia. 219.

95. *Willock v. Wilson*, *supra*; *Lothrop v. Blake*, 3 Pa. St. 483.

certify in each capacity.⁹⁶ It has been held, however, that this requirement is a matter of form rather than of substance.⁹⁷

§ 19. **Annexing the seal.**—The statute requires that the seal of the court, where there is one, be annexed to the clerk's attestation of the transcript of the record.⁹⁸ Annexing it to the judge's certificate authenticating the attestation of the clerk does not satisfy the requirement of the statute.⁹⁹

§ 20. **Judge's certificate as to the form of the clerk's attestation.**—The statute prescribes that the clerk's attested transcript of the record shall be accompanied by a certificate of the presiding judge showing that the attested transcript is executed in due form.¹⁰⁰ It is not essential to set out the form of the attestation.¹ Nor is it essential that the certificate of the judge show that the person who makes the attestation is the clerk of the court.² Nor that the seal annexed to the attestation is the seal of the court.³ It is suffi-

96. *Rowe v. Barnes*, 101 Ia. 302, 70 N. W. R. 197.

97. *Keith v. Stiles*, 92 Wis. 15, 64 N. W. R. 860, 65 N. W. R. 860.

98. *McFarlane v. Harrington*, 2 Bay (S. C.) 555; *Allen v. Thaxter*, 1 Blackf. (Ind.) 399.

99. *Kirschner v. State*, 9 Wis. 140.

100. *Westerman v. Sheppard*, 52 Neb. 124, 71 N. W. R. 950; *Smith v. Brockett*, 69 Conn. 492, 38 Atl. R. 57.

1. *Regan v. McCormick*, 4 Harr. (Del.) 435.

2. *Haynes v. Cowen*, 15 Kan. 637.

3. *Duncommun v. Hysinger*, 14 Ill. 249; *Linch v. McLemore*, 15 Ala. 632.

ent that the certificate shows that the attestation of the clerk is executed in due form. The certificate should show that the judge who signed it is the sole or presiding judge. But where this fact is shown by the record, omitting to state it in the judge's certificate is not material.⁴ Where the certificate of the judge, or the attestation by the clerk, shows that the court comprises more than one judge it should appear that the certificate is signed by the chief justice or presiding magistrate.⁵ But where there is nothing in the attestation of the clerk or in the judge's certificate to show that there is more than one judge of the court the presumption that there is only one judge is generally held to be sufficient on this point.⁶

§ 21. **Scope and application of the federal statute.**—The statute under discussion is applicable not only to judgment records but also to all other matters included in the term "judicial proceedings."⁷ It embraces records of courts of chancery,⁸ and records of probate courts.⁹ As regards

4. *Ohio v. Hinchman*, 27 Pa. St. 479.

5. *Randall v. Burtis*, 57 Tex. 362; *Van Storch v. Griffin*, 71 Pa. St. 240.

6. *Wilock v. Wilson*, *supra* (certif. stated that he was the judge); *People v. Smith*, 121 N. Y. 578, 24 N. E. R. 852; *Low v. Burrows*, 12 Cal. 181.

7. *Virginia v. Himel*, 10 La. Ann. 185; *in re Rooney*, 20 Fed. Cas. No. 12,032.

8. *Patrick v. Gibbs*, 17 Tex. 275; *Burtners v. Keran*, 24 Gratt. (Va.) 42.

the records of justices of the peace, some courts hold that where the court is a court of record the statute applies. Even where the justice of the peace has no clerk or seal.¹⁰ But where the court is not a court of record the decisions hold the contrary.¹¹ The records of a justice of the peace may be proved by a sworn copy,¹² or by a copy that is authenticated in the mode foreign judgments are authenticated.¹³ They may also be proved by introducing the original records properly verified.¹⁴ Many courts hold that the statute is not applicable to the federal courts.^{14a}

§ 22. Mode of proving documents and records not appertaining to a court.—"All records and exemplifications of books, which may be kept in any public office of any state or territory, or of any county subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or terirtory, or in such county, by the attestation of the keeper of the said records or books, and the seal of his office annexed,

9. *Atwood v. Buck*, 113 Ill. 268; *Wilt v. Cutler*, 38 Mich. 189; *Grimes v. Smith*, 70 Tex. 217, 8 S. W. R. 33.

10. *Blodgett v. Jordan*, 6 Vt. 680; *Bissell v. Edwards*, 5 Day (Conn.) 363, 5 Am. Dec. 166.

11. *Sloan v. Wolfsfeld*, 110 Ga. 70, 35 S. E. R. 344; *Draggo v. Graham*, 9 Ind. 212; *Warren v. Flagg*, 19 Mass. 448, 449.

12. *Winham v. Kline*, 77 Mo. App. 36.

13. *Duvall v. Ellis*, 13 Mo. 203.

14. *Kean v. Rice*, 12 Serg. & R. (Pa.) 203.

14a. *Kingman v. Cowles*, 103 Mass. 283; *McGregor v. Hampton*, 70 Mo. App. 98.

if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the state, or territory, or county, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the state, territory, or county aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken.”¹⁵

§ 23. Same. Application of the foregoing statute.—The term “records,” as used in the foregoing statute, includes all documents of a public nature which the party has a right to inspect, and which would give rise to inconvenience in transferring the same.¹⁶ The statute has

15. U. S. Rev. Stat. (1878), § 906, U. S. Comp. Stat. (1901) 677.

16. Chase v. Caryl, 57 N. J. L. 545, 31 Atl. R. 1024.

been held to apply to records of conveyances and mortgages of lands;¹⁷ marriage certificates;¹⁸ marriage licenses;¹⁹ powers of attorney;²⁰ transfers of personalty,²¹ etc. It also has been held to apply where the purpose is to prove the date of recording a deed of lands.²² On the other hand, the statute is not applicable where copies of the records are inadmissible in the state where the records are made, or where the evidence fails to show that they are admissible there.²³ Nor is it applicable to unauthorized records.²⁴

It should also be observed that the provisions of the statute in regard to the mode of authentication of the office copies must be complied with to render the copies admissible.²⁵

17. *Chase v. Caryl*, *supra*; *Dunlap v. Daugherty*, 20 Ill. 397; *Garrignes v. Harris*, 17 Pa. St. 344.
18. *People v. Perriman*, 72 Mich. 184, 40 N. W. R. 425; *State v. Horn*, 43 Vt. 20.
19. *King v. Dale*, 2 Ill. 513.
20. *Rochester v. Toler*, 4 Bibb (Ky.) 106.
21. *James v. Kirk*, 29 Miss. 206; *Bruce v. Smith*, 3 Harr. & J. (Md.) 499.
22. *Schweigel v. L. A. Shakman Co.*, 78 Minn. 142, 80 N. W. R. 871, 81 N. W. R. 529 (In this case the lands were in one state and the record of a certified copy of the deed was in another state).
23. *Munkers v. McCoskill*, 64 Kan. 516, 68 Pac. R. 42; *Clardy v. Richardson*, 24 Mo. 295.
24. *Martin v. Martin*, 22 Ala. 86.
25. *Taylor v. McKee*, 118 Ga. 874, 45 S. E. R. 672 (clerk's certificate that the judge is qualified essential); *Paca v. Dutton*, 4 Mo. 371 (omission of certificate of presiding

§ 24. Mode of proof provided by statute not exclusive.—The mode of proof provided by the federal statute is not exclusive. Moreover, it does not abrogate any other mode of proof.²⁶

§ 25. Mode of proving state records in federal courts.—State records are provable in a federal court sitting in another state when authenticated according to the mode provided in the federal statute cited in foot-note 15.²⁷ Where the federal court is sitting in the state where the records are made they are provable by the certificate of the clerk with the seal annexed.²⁸

§ 26. Mode of proving foreign public records.—In some states there are statutes which provide modes by which foreign public records are provable. In the absence of such statutes, the records are provable by any evidence that legitimately tends to prove that the document offered is in fact certified by the official custodian of the original of which it purports to be a copy, and

judge that attestation of clerk is in due form); *Phillips v. Flint*, 3 La. 146 (attestation not under seal),

26. *Goodwyn v. Goodwyn*, 25 Ga. 203; *Pabst Brewing Co. v. Smith*, 59 Mo. App. 476; *Hall v. Bishop*, 78 Ind. 370 (sworn copy admissible); *Smith v. Strong*, 14 Pick. (Mass.) 128 (sworn copy); *Louisville, etc., Ry. Co. v. Shires*, 108 Ill. 617; *Karr v. Jackson*, 28 Mo. 316.

27. *United States v. Biebush*, 1 Fed. R. 213, 1 McCray, 42.

28. *Turnbull v. Payson*, 95 U. S. 418, 24 L. ed. 437; *Mewster v. Spalding*, 17 Fed. Cas. No. 9513, 6 McLean 24.

that he has due authority to make such certificates.²⁹

§ 27. Mode of proving federal legislative journals.—By an act of congress “extracts from the *journals* of the senate or the house of representatives, and of the executive journal of the senate, when the injunction of secrecy is removed, certified by the secretary of the senate or by the clerk of the house of representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have, if produced and authenticated in court.”³⁰

§ 28. Mode of proving proclamations, etc.—“Proclamations and other acts and orders of the executive of the like character may be proved by production of the government gazette in which they were authorized to be printed. Printed copies of public documents transmitted to congress by the president of the United States, and printed by the printer to congress are evidence of those documents.”³¹

§ 29. Mode of proving the contents of official registers, etc.—Mr. Stephen says “An entry in any record, official book or register kept in any state, or at sea, or in any foreign country, stat-

29. 17 Cyc. 360. See also, *Barber v. Mexico International Co.*, 73 Conn. 587, 48 Atl. R. 758; *Mauri v. Heffernan*, 13 Johns. (N. Y.) 58.

30. U. S. Rev. Stat. § 895, U. S. Comp. Stat. 1901, p. 673.

31. Greenl. Evid., § 479. See also, *Post v. Supervisors*, 105 U. S. 667; notes, 58 Am. Dec. 754.

ing, for the purpose of being referred to by the public, a fact in issue or relevant, or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book or register is kept, is itself deemed to be a relevant fact."³² Such official books or registers include, among others, registers of births, marriages and deaths;³³ custom-house revenue books;³⁴ land tax assessments;³⁵ official prison books;³⁶ official log-books;³⁷ official books containing records of the weather;³⁸ official books containing records of legislative votes;³⁹ post-office records of registered letters;⁴⁰ registries of deeds and mortgages;⁴¹ school records of attendance;⁴² records of baptism;⁴³ records of town officers as to receipts and disbursements;⁴⁴

32. Steph. Dig. Evid., art. 34

33. *Jacobi v. Order of Germania*, 26 N. Y. S. 318; *Sumner v. Sebec*, 3 Me. 223; *Doe v. Barnes*, 1 Moody & Rob. 386.

34. *Johnson v. Ward*, 6 Esp. 487.

35. *Doe v. Seaton*, 2 Adol. & Ell. 178.

36. *Salte v. Thomas*, 3 Bos. & P. 188.

37. *D'Israeli v. Jowett*, 1 Esp. 427.

38. *Evanston v. Gunn*, 99 U. S. 660; *Knott v. Raleigh Ry. Co.*, 98 N. C. 73, 2 Am. St. Rep. 321; *Hart v. Walker*, 100 Mich. 406.

39. *Reed v. Lamb*, 29 L. J. (Exch.) 452.

40. *Gurney v. Howe*, 9 Gray (Mass.) 404, 69 Am. Dec. 299.

41. *Conway v. Case*, 22 Ill. 127.

42. *Thurston v. Luce*, 61 Mich. 292.

43. *Durfee v. Abbott*, 61 Mich. 471.

44. *Thornton v. Campton*, 18 N. H. 20.

records of the state reformatory;⁴⁵ records of city ordinances,⁴⁶ etc.

§ 30. Mode of proving federal court records.—The relation which federal courts sustain toward one another is domestic rather than foreign. For this reason the U. S. Rev. Stat., § 905, which provides a mode for proving the judicial records of the sister states is not applicable to the records of the federal courts.⁴⁷

The records of one federal court are provable in another federal court by means of a transcript of the records duly certified by the clerk of the court whose certificate has the seal of the court annexed.

§ 31. Proving judicial records by authorized officers.—Statutes exist in nearly all the states which provide for the making of copies of records by particular officers; and copies made by such officers and certified to by them are admissible in evidence. This kind of a copy, like a sworn copy, does not require a seal annexed.

§ 32. Proving judicial records by means of sworn copies.—Any competent witness who has compared a copy of a judicial record with the original may testify to the correctness of the copy; and this testimony, together with proof that the original record was in the proper cus-

45. *People v. Kemp*, 76 Mich. 410.

46. *Com. v. Chase*, 6 Cush. 248.

47. *Morgan v. New York Nat'l, etc., Assoc.*, 73 Conn. 652; *McGregor v. Hampton*, 70 Mo. App. 98; *Kingman v. Cowles*, 103 Mass. 283.

tody, renders the copy admissible. It is essential, however, that the proper custody of the original be established by evidence *de hors* the transcript.

§ 33. Mode of proving judicial records by the clerk of the court.—A judicial record may be proved by a transcript thereof, accompanied by a certificate of the clerk of the court with the seal of the court annexed thereto, stating that the transcript is a full, complete and true copy of the record which is in his custody by authority of law.

§ 34. Mode of proving quasi-judicial records.—Quasi-judicial records are proved either by producing the original records or properly certified copies. Such records comprise “the results of inquiries made under public authority concerning matters of public or general interest, though the affairs to which they relate are private. They are generally the conclusions of juries, coroners, commissioners or other officers under oath, and often, though not necessarily, based on evidence taken under oath.”

§ 35. Attested documents.—Attestation is the act of witnessing a document at the request of the maker and subscribing it as a witness. An attested document is one that is subscribed by one or more witnesses. An attesting or subscribing witness, as defined by Dr. Greenleaf, “is one who was present when the instrument was executed, and who, at that time, at the request and with the assent of the party, subscribed his

name to it as a witness of the execution. If his name is signed, not by himself, but by the party, it is no attestation. Neither is it such if, though present at the execution, he did not subscribe the instrument at that time, but did it afterwards, and without request, or by the fraudulent procurement of the other party. But it is not necessary that he should have actually seen the party sign, or have been present at the very moment of signing; for if he is called in immediately afterwards, and the party acknowledges his signature to the witness, and requests him to attest it, this will be deemed part of the transaction, and therefore a sufficient attestation.”⁴⁸

§ 36. **Mode of proving attested documents.**—At common law, a general rule has existed from early times that in proving an attested document it is essential to call at least one of the subscribing witnesses. Several reasons have been assigned for this rule. One is that the parties to the document, at the time of its execution, agrees that in case it becomes necessary to prove its execution the subscribing witness, or at least one of them in case of more than one, should first be called. As said by Pollock, C. B., “The attesting witness must be called to prove the execution of a deed for this reason, that by an imperative rule of law the parties are supposed to have agreed *inter se* that the deed shall not be

48. Greenl. Evid. § 569a. See also, *Cussons v. Skinner*, 11 M. & W. 168.

given in evidence without his being called to depose to the circumstances attending its execution."⁴⁹ And as said by Cresswell, J., "It is not on the ground that his is the best evidence. . . . but because he is the witness agreed upon between the parties."⁵⁰ Another reason assigned for the rule is that the adverse party should be afforded an opportunity to cross-examine the attesting witness. As said by Le Blanc, J., "A fact may be known to the subscribing witness not within the knowledge or recollection of the obligee, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction."⁵¹

Each of the foregoing reasons, however, assigned for the rule is weak; and each has given rise to much criticism. Burket, J., in commenting upon the former, says, "This supposed mutual agreement is a pure fiction, and rarely, if ever, exists in fact. If in any case it has a real existence, and can be shown, it may perhaps be enforced; but the mere fiction is entitled to no weight and to no respect."⁵² And Spencer, J., in commenting upon the same reason for the rule, says, "The notion that the persons who attest an instrument are agreed upon to be the only witnesses to prove it is not comfortable to the truth of transactions of this kind, and, to speak

49. *Whyman v. Garth*, 8 Exch. 803.

50. *Gerapulo v. Wieler*, 10 C. B. 690, 696.

51. *Call v. Dunning*, 4 East 54.

52. *Garrett v. Hanshue*, 53 Ohio St. 482.

with all possible delicacy, is an absurdity.”⁵³ As regards the latter of the two reasons for the rule stated above, the chief criticism has been that in most cases the attesting witnesses have no material knowledge of the transactions. But notwithstanding the criticisms of the rule it has been recognized very generally.⁵⁴

§ 37. **Scope of the rule.**—The scope of the common-law rule which requires that an attesting witness be called is broad. It is applicable to documents under seal⁵⁵ and to those not under seal.⁵⁶ Moreover, it has been held to be applicable to documents not required by law to be attested,⁵⁷ as well as to those required to be attested. It has been held to apply to contracts for the sale of land;⁵⁸ deeds of land;⁵⁹ promissory notes;⁶⁰ bills of sale;⁶¹ articles of copartner-

53. *Hall v. Phelps*, 2 Johns. (N. Y.) 451.

54. *Howard v. Russell*, 104 Ga. 230, 30 S. E. R. 802; *Hannan v. Greenfield*, 36 Oreg. 97, 58 Pac. R. 888; *Collins v. Sherbet*, 114 Ala. 480, 21 So. R. 997; *Foye v. Leighton*, 24 N. H. 29.

55. *International, etc., Ry. Co. v. McRae*, 82 Tex. 614, 18 S. W. R. 672, 27 Am. St. Rep. 926; *Clarke v. Courtney*, 5 Pet. (U. S.) 319.

56. *Townsend v. Covington*, 3 McCord (S. C.) 219; *Bennett v. Robinson*, 3 Stew. & P. (Ala.) 227.

57. *Grannone v. Fleetwood*, 93 Ga. 491, 45 Tex. 567.

58. *Townsend v. Covington*, *supra*.

59. *Woodman v. Segar*, 25 Me. 90; *Ellis v. Doe*, 10 Ga. 253; *Allred v. Elliott*, 71 Ala. 224.

60. *Labarthe v. Gerbeau*, 1 Mart. N. S. (La.) 486.

61. *Horton v. Hagler*, 8 N. C. 48.

ship;⁶² applications for insurance;⁶³ submissions and awards;⁶⁴ chattel mortgages;⁶⁵ leases;⁶⁶ receipts;⁶⁷ releases;⁶⁸ contracts of agency;⁶⁹ notices to quit,⁷⁰ etc. The rule has been held to apply to a document executed by a person unable to write.⁷¹ And also where the subscribing witness is blind;⁷² or where the document has been cancelled;⁷³ or destroyed by fire and the subscribing witnesses are not known.⁷⁴ It is also applicable to a forged document as well as to a genuine one.⁷⁵

Where one of two subscribing witnesses to a document is incompetent to testify the other must be called.⁷⁶ The fact that the alleged maker of the document has admitted that he executed

62. *Tams v. Hitner*, 9 Pa. St. 441.

63. *Read v. Metropol. L. Ins. Co.*, 17 Misc. (N.Y.) 307, 40 N. Y. Suppl. 374.

64. *Tyler v. Stephens*, 7 Ga. 278.

65. *Jones v. State*, 113 Ala. 95, 21 So. R. 229.

66. *Barry v. Ryan*, 4 Gray (Mass.) 523.

67. *McMahon v. McGrady*, 5 Serg. & R. (Pa.) 314.

68. *Citizens Bank v. Nantucket Steamboat Co.*, 2 Story 16.

69. *Hannan v. Greenfield*, 36 Oreg. 97, 58 Pac. R. 888.

70. *Doe v. Durnford*, 2 Maule & S. 62.

71. *Hess v. Griggs*, 43 Mich. 397, 5 N. W. R. 427.

72. *Cronk v. Frith*, 9 Car. & P. 197.

73. *Porter v. Wilson*, 13 Pa. St. 641; *Kelsey v. Hammer*, 18 Conn. 311.

74. *Gillies v. Smithen*, 2 Stark. 528.

75. *Stemper v. Griffin*, 20 Ga. 312, 65 Am. Dec. 628.

76. *Umphreys v. Hendricks*, 28 Ga. 157.

it,⁷⁷ or the fact that he offers to testify to his own execution of it, does not dispense with the necessity of calling the attesting witness.⁷⁸

§ 38. Qualifications of the rule at common law.—Lord Ellinborough says, in speaking of the rule, it is “as fixed, formal and universal as any that can be stated in a court of justice.”⁷⁹ It has, however, several important qualifications. If the subscribing witness is dead,⁸⁰ or insane,⁸¹ or without the jurisdiction of the court,⁸² or cannot be found,⁸³ or is incompetent to testify,⁸⁴ the rule does not apply. Moreover, where the document is lost, and the name of the

77. *Zerby v. Wilson*, 3 Ohio 42, 17 Am. Dec. 577; *Shaver v. Ehle*, 16 Johns. (N.Y.) 201; *Kinney v. Flynn*, 2 R. I. 319; *Ellis v. Doe*, 10 Ga. 253.

78. *R. v. Harringworth*, 4 Maule & S. 350; *Pétree v. Wilson*, 104 Ala. 157, 16 So. 143; *Fletcher v. Perry*, 97 Ga. 368, 23 S. E. R. 824.

79. *R. v. Harringworth*, *supra*.

80. *Armstrong v. Den*, 15 N. J. L. 186; *Howard v. Snelling*, 32 Ga. 195; *McGowan v. Laughlan*, 12 La. Ann. 242.

81. *Neely v. Neely*, 17 Pa. St. 227; *Bennett v. Taylor*, 9 Ves. 381. See also, note, 35 L. R. A. 336.

82. *Smith v. Keyser*, 115 Ala. 455, 22 So. 149, *Troedor v. Hyams*, 153 Mass. 536; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715 and note; *McMinn v. Whelan*, 27 Cal. 300; *Clardy v. Richardson*, 24 Mo. 295. See also note, 35 L. R. A. 325.

83. *Gallagher v. London Ass. Corp.*, 149 Pa. St. 25; *Spring v. Ins. Co.*, 8 Wheat. (U.S.) 269; *Falmouth v. Roberts*, 9 M. & W. 469.

84. *Robertson v. Allen*, 16 Ala. 106; *Packard v. Dunsmore*, 11 Cush. (Mass.) 283; *Keefer v. Zimmerman*, 22 Md. 274.

subscribing witness is not known, the rule is not applicable.⁸⁵

It has been held that where it is agreed that the adverse party may introduce the document in evidence without calling the attesting witness it may be done.⁸⁶ On the other hand, it has been held that where this is done it does not give the party the right to do so at a subsequent trial.⁸⁷ Where signatures are added to a promissory note or bill of exchange subsequent to attestation it is not necessary to call the subscribing witness to prove the genuineness of the signatures.⁸⁸ And although, as previously stated, the general rule is applicable to forged, as well as genuine, documents, it has been held, in a trial for larceny, that where a bill of sale is introduced as a forgery to support the credit of a witness the subscribing witness need not be called.⁸⁹ It also has been held that it is not necessary to call either of the subscribing witnesses to a deed where the fact sought to be proved is an *erasure* in the deed.⁹⁰ In New York the rule has been held to apply to documents under seal,⁹¹ but not to negotiable instruments.⁹² Also

85. *Porter v. Wilson*, *supra*; *Kelsey v. Hammer*, *supra*.

86. *Jones v. Henry*, 84 N. C. 320, 37 Am. Rep. 624; *Blake v. Sawin*, 10 Allen (Mass.) 340.

87. *Baldrige v. Walton*, 1 Mo. 520.

88. *Harding v. Cragie*, 8 Vt. 501.

89. *State v. Wier*, 12 N. C. 363.

90. *Penny v. Corwithe*, 18 Johns. (N.Y.) 499.

91. *Fox v. Reil*, 3 Johns. (N.Y.) 477. See also, *Shaver v. Ehle*, 16 Johns. (N.Y.) 201.

that a document not under seal may be proved by the admission of the maker without calling the subscribing witness.⁹³ Where the admission is made in the pleadings, some courts hold that the subscribing witness need not be called,⁹⁴ and some hold the contrary.⁹⁵ Where the admission is made by counsel in open court it has been held that calling the subscribing witness is not necessary.⁹⁶

§ 39. **Statutory restrictions of the rule.**—In this country and in England statutory enactments restrict the common-law rule very materially. These statutes obtain in Massachusetts, New York, Michigan, Illinois, Pennsylvania, Alabama, Rhode Island and other states. The Massachusetts statute provides that "It shall be competent to prove the signature to any attested instrument or writing, except a will, in the same manner as if such instrument were not attested."⁹⁷ The English statute, which was passed in 1854, provides substantially the same thing.⁹⁸ It restricts the rule to documents required by

92. *Hall v. Phelps*, 2 Johns. 451. See also, *Pentz v. Winterbottom*, 5 Den. (N.Y.) 51.

93. *Gilberton v. Ginochio*, 1 Hilt (N.Y.) 218.

94. *Smith v. Gale*, 4 Dak. 182, 29 N. W. R. 661, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521.

95. *Roberts v. Tennell*, 3 T. B. Mon. (Ky.) 247 (admission in an answer in chancery); *Call v. Dunning*, 4 East 53. (admission in an answer to a bill for discovery).

96. *Grady v. Sharron*, 6 Yerg. (Tenn.) 320.

97. Statutes of 1897, chap. 387.

98. 17 and 18 Vict., chap. 125.

law to be attested. It is worded as follows: "It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto."

§ 40. Number of subscribing witnesses necessary.—Although the document may require two or more subscribing witnesses the production of one of them at the trial is ordinarily sufficient.⁹⁹ It has been held, however, that it is essential that the witness be able to prove all the facts necessary to the legal execution of the instrument. The mere fact that he is able to prove only his own signature and that of the other subscribing witnesses is not sufficient.¹⁰⁰ Moreover, it has been held that the trial judge may, in his discretion, require that all the subscribing witnesses be produced, provided they be living and be within the jurisdiction of the court.¹

§ 41. Requisite conditions pertaining to the act of signing.—A person is not a subscribing witness to the execution of a document where his name is subscribed to it without his knowledge or consent.² Nor is he a subscribing witness, in the technical sense, where he affixes his signa-

99. *Allen v. Hoxey*, 37 Tex. 320; *White v. Wood*, 8 Cush. (Mass.) 413.

100. *Martin v. Bowie*, 37 S. C. 102, 15 S. E. R. 736; *Jackson v. Le Grange*, 19 Johns. (N.Y.) 386, 10 Am. Dec. 237.

1. *Burke v. Miller*, 7 Cush. (Mass.) 547.

2. *Handy v. State*, 7 Harr. & J. (Md.) 42.

ture without being requested to do so, or without the consent of the parties by whom it is executed.³ It is not essential, however, that he should see the parties to the document affix their signatures. It is sufficient if they acknowledge them and request him to sign as a subscribing witness.⁴

§ 42. **Sufficiency of the testimony.**—It is not essential that the subscribing witness remembers the act of execution by the parties to the document. If he testifies to the genuineness of of his own signature, and that it would not be on the document had he not been requested to sign it as a witness, and furthermore, had it not been executed in his presence or acknowledged to him, it is sufficient.⁵

§ 43. **Sufficiency of absence of the subscribing witness.**—Ordinarily, if the party is unable to produce the subscribing witness the execution of the document may be proved without his testimony.⁶ But mere absence in a distant part of the state is not sufficient.⁷ Nor is mere tempo-

3. Schomaker v. Dean, 201 Pa. St. 439, 50 Atl. R. 923; Sherwood v. Pratt, 63 Barb. (N.Y.) 137.

4. Pequawkett Bridge v. Mathes, 7 N. H. 230, 26 Am. Dec. 737; Hale v. Stone, 14 Ala. 803.

5. Robinson v. Brennan, 115 Mass. 582; Hale v. Stone, *supra*; Wheeler v. Hatch, 12 Me. 389.

6. Clarke v. Courtney, 5 Peters (U.S.) 343. See also, note 35 L. R. A. 326 *et seq.*

7. Jackson v. Root, 18 Johns. (N.Y.) 60; Tams v. Hitner, 9 Pa. St. 441.

rary absence from the state sufficient.⁸ An earnest effort must be made in due season to produce him.⁹ Inquiry should be made in good faith at his place of residence, and of persons who would be likely to know of his whereabouts.¹⁰ And if, after a reasonable attempt to locate him, he cannot be found, the execution of the document may be proved without his testimony.¹¹ Where it appears that the witness is seeking to avoid being present at the trial, courts do not demand as great diligence in attempting to produce him.¹² And where the proof shows collusion between the adverse party and the witness the courts refuse to apply the rule.¹³ Likewise where the adverse party wrongfully withholds the document.¹⁴ Where the document is executed outside the state it is not necessary, ordinarily, to produce the subscribing witness.¹⁵ In such case a presumption exists that he is a non-resident. And where the subscribing witness is without the state it is not necessary to attempt to get his deposition.¹⁶

8. *Mills v. Twist*, 8 Johns. (N.Y.) 121.

9. *Mills v. Twist*, *supra*.

10. *Jackson v. Waldron*, 13 Wend. (N.Y.) 199.

11. *Jackson v. Chamberlain*, 8 Wend. (N.Y.) 199; *Clark v. Sanderson*, 3 Binn. (Pa.) 192, 5 Am. Dec. 368.

12. *Mills v. Twist*, *supra*.

13. *Mills v. Twist*, *supra*.

14. *Davis v. Spooner*, 3 Pick. (Mass.) 284.

15. *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715 and note; *McMinn v. O'Connor*, 27 Cal. 238.

16. *Clark v. Houghton*, 12 Gray (Mass.) 38.

§ 44. Adverse party claims interest under the document.—It is sometimes said that where the document is in the possession of the adverse party, and is produced by him pursuant to notice, the rule requiring that the subscribing witness be called does not apply. It is to be observed, however, that the adverse party must also claim a beneficial interest under the document.¹⁷ If the adverse party, on cross-examination, admits that he has in his possession a document under which he claims a beneficial interest, and the document is material to the issue, the court may order him to produce it, in which case it may be introduced in evidence without calling the subscribing witness.¹⁸

§ 45. Document collaterally in issue.—Where the document comes into the case collaterally and is not directly in issue it is not essential to call the subscribing witness. It may be proved in such case by any competent testimony.¹⁹

§ 46. Rule not applicable to ancient documents.—The rule under discussion is not applicable to documents which are at least thirty years old, which are free from suspicion and

17. *Doe v. Cleveland*, 9 Barn. & C. 864.

18. *McGregor v. Wait*, 10 Gray (Mass.) 72, 69 Am. Dec. 305.
See also note, 35 L. R. A. 346 *et al.*

19. *National Computing Scale Co. v. Eaves*, 116 Ga. 511, 42 S. E. R. 783; *Leavering v. Smith*, 115 N. C. 385, 20 S. E. R. 446; *Steiner v. Trantum*, 98 Ala. 315, 13 So. R. 365; *Kitchen v. Smith*, 101 Pa. St. 452. See also, *Skinner v. Brigham*, 126 Mass. 132.

which are produced from the proper custody. In this country, however, it is also essential, according to the weight of authority, that there be some corroborating evidence of the genuineness of the document, in addition to the fact that it is produced from the proper custody.²⁰ According to the English decisions, however, this feature is not necessary.²¹

§ 47. Rule not applicable when the attested document is acknowledged under a statute.—

“Whenever a statute authorizes the acknowledging of an instrument, providing at the same time that such instrument shall be admissible in evidence on proof of its acknowledgment, then if the conditions required by the statute as prerequisites of the acknowledging appear from the record to have been observed, it is not necessary to call the attesting witnesses, but such instrument may be put in evidence after the acknowledgement required by the statutes, either by force of the statutes, or at common law, by proving the execution.”²²

§ 48. Secondary evidence of execution of document.—According to the English rule, “If it

20. *Pridgen v. Green*, 80 Ga. 737, 7 S. E. R. 97; *Homer v. Cilley*, 14 N. H. 85; *Wilson v. Simpson*, 80 Tex. 279; *Clark v. Owens*, 18 N. Y. 434.

21. *Steph. Dig. Evid.*, art. 88; *Taylor on Evid.* (10th ed.), § 871.

22. *Steph. Dig. Evid.*, art. 69. See also to same effect *Smith v. Gale*, 144 U. S. 509; *Simpson v. Mundee*, 3 Kan. 181; *Gragg v. Learned*, 109 Mass. 167; *Doe v. Johnson*, 3 Ill. 522; *Hinchliff v. Hinman*, 18 Wis. 130.

be shown that no attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."²³ In this country, however, the decisions upon this question are conflicting. Judge Story says, "Where the subscribing witness is dead or cannot be found, or is without the jurisdiction, or is otherwise incapable of being produced, the *next best secondary evidence* is the *proof of his handwriting*; and that, when proved, affords *prima facie* evidence of a due execution of the instrument, for it is presumed that he would not subscribe his name to a false attestation. If upon due search and inquiry, no one can be found who can prove his handwriting, there is no doubt that resort may then be had to proof of the *handwriting* of the party who executed the instrument; indeed, such proof may always be produced as corroborative evidence of its due and valid execution, though it is not, except under the limitation above suggested, primary evidence."²⁴ And another eminent jurist, in stating substantially the same view, says: "In proving deeds, the proper course is first to call the subscribing witness; if he cannot be had, you may then prove his handwriting as the next best evidence. When it appears that that cannot be done, and not before, proof may be given of the

23. Steph. Dig. Evid., art. 66.

24. Clarke v. Courtney, 5 Peters (U.S.) 344.

handwriting of the grantor.”²⁵ And it has been held in New York that “the same diligence should be exacted in endeavoring to prove the handwriting, that is required in the endeavor to find and procure the personal attendance of the witness, at least, before the third degree of evidence is admitted, to-wit: the handwriting of the party.”²⁶

On the other hand, in many jurisdictions, the rule which requires that the handwriting of at least one of the subscribing witnesses be proved, where all of the subscribing witnesses are unavailable, before proof of the signature of the party who executed the document may be made, has been severely criticised and repudiated. Lumpkin, J., in commenting upon it, says, “A technical and artificial rule had prevailed over our right reason.”²⁷ And Trumbull, J., says, “Why proof of the handwriting of a subscribing witness should be better evidence of the execution of an instrument than that of the obligor is not very apparent, and the attempts to give a reason have not in my judgment been very satisfactory. . . . As a general rule, therefore, whenever the subscribing witnesses to an instrument are beyond the jurisdiction of the court, its

25. *Wilson v. Betts*, 4 Denio (N.Y.) 203. See also, *Jones v. Roberts*, 65 Me. 173; *Snider v. Burks*, 84 Ala. 53, 4 So. R. 225; *Groover v. Coffee*, 19 Fla. 61; *Angier v. Howard*, 94 N. C. 27; *Glover v. Armstrong*, 15 N. J. L. 186.

26. *Pelletreau v. Jackson*, 11 Wend. (N.Y.) 110.

27. *Watt v. Kilburn*, 6 Ga. 356, 358.

execution may be proved by proof of the handwriting of the grantor or obligor. This rule does not, of course, apply to instruments which the law requires to be attested by witnesses. In such cases evidence of the handwriting of both party and witness would be requisite."²⁸ It has been said that evidence of the handwriting of the party who executes the document is more satisfactory than evidence of the handwriting of the subscribing witness.²⁹

§ 49. Party seeking to prove the document may cross-examine the subscribing witness.—Ordinarily, a party is not allowed to cross-examine his own witness. But since the party who seeks to prove the document is compelled to call the subscribing witness he may cross-examine him.³⁰ He may not, however, impeach his credibility by showing that his general reputation for truth and veracity is bad.³¹ It has been held, however, that he may show that the subscribing witness made statements out of court contradictory to his testimony on the witness stand.³² On the other hand, it has been held that he may not impeach a deceased subscribing wit-

28. *Newson v. Luster*, 13 Ill. 175. See also to same effect *Smith Charities v. Connolly*, 157 Mass. 272, 31 N. E. R. 1058; *Landers v. Bolton*, 26 Cal. 393; *Cox v. Davis* 17 Ala. 714, 52 Am. Dec. 199; *Snider v. Burks*, *supra*; *Jones v. Roberts*, *supra*.

29. *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715.

30. *Bowman v. Bowman*, 2 Moody & Rob. 501.

31. *Whitaker v. Salisbury*, 15 Pick. (Mass.) 534.

32. *Stobart v. Dryden*, 1 M. & W. 615.

ness by showing that he made declarations denying his signature.

§ 50. Mode of proving unattested writings.—Unattested writings may be proved by the writers themselves, by persons who saw them executed, or by proving the handwriting. The handwriting may be proved either by experts or nonexperts. "When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the writer himself, or some person who actually saw the paper or signature written. When evidence such as this cannot be procured, as must often be the case, recourse may be had, either to the testimony of witnesses, who are acquainted with the handwriting, or to a comparison of the document in dispute with any writing proved to the satisfaction of the court to be genuine. These last modes of proof, indeed, may in all cases be given in the first instance, since the law recognizes no distinction between them and the ocular proof just mentioned; but as they are obviously of a less satisfactory character than direct testimony, any unnecessary reliance on them is calculated to raise suspicion that the party is actuated by some improper motive in withholding evidence of a more exclusive nature."³³

§ 51. Mode of proving the existence, organization, acts and proceedings of a corporation.—

33. 2 Taylor on Evid. (9th ed.), sec. 1862.

The existence of a corporation may be shown by proving a charter or certificate of incorporation granted by the proper official, usually the secretary of state, and user thereunder.³⁴ As a general rule, however, the existence, organization, acts and proceedings of a corporation may be shown by the books of the corporation.³⁵ They are competent to prove admissions of the corporation itself and also of its members.³⁶ They are admissible not only in the case of disputes between the corporation and its members, and between its members, but also in the case of a dispute between the corporation or its members and strangers.³⁷ As a general rule, however, they are not admissible, as regards private matters, to establish claims of the corporation against non-stockholders.³⁸ Mr. Morawetz says,

34. *Wilmington, etc., Ry. Co. v. Thompson*, 52 N. C. 387; *Sampson v. Bowdoinham Steam Mill Corp.*, 36 Me. 78; *Eaton v. Aspinwall*, 19 N. Y. 119.
35. *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; *North River Meadow Co. v. Christ Church* 22 N. J. L. 424, 53 Am. Dec. 258; *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. R. 1046, 82 Am. St. Rep. 816, 12 L. R. A. 473.
36. 10 Cyc. 514; *Lake Shore, etc., Ry. Co. v. Ward*, 135 Ill. 511, 26 N. E. R. 520; *Leonard v. New York Cent., etc., Ry. Co.*, 80 N. Y. 659; *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84.
37. *Dolan v. Wilkerson*, 57 Kan. 758, 48 Pac. R. 23; *Old South Soc. v. Wainwright*, 156 Mass. 115, 30 N. E. R. 476; *Redding v. Godwin*, 44 Minn. 355, 46 N. W. R. 563.
38. *Fish v. Smith*, 73 Conn. 377, 47 Atl. R. 711, 84 Am. St. Rep. 161; *Wheeler v. Walker*, 45 N. H. 355; *Carey v. Williams*, 79 Fed. R. 906. See also *Thompson on Corp.*, chap. 30, art. 3.

“The stock-books of a corporation are undoubtedly evidence against it as admissions; but they cannot be admitted on this ground for the company against a person who denies that he is a shareholder.”³⁹ On the other hand, many cases hold that the books of a corporation may be admissible in its behalf against strangers.⁴⁰ They have been held admissible to prove an assignment by the corporation.⁴¹ Also to rebut a charge of negligence by the corporation by showing that it took the precaution to appoint a committee for a given purpose.⁴² Mr. Abbott says, “Whenever the action of a deliberative body — whether that of a corporation at large, its board or a committee — is competent to be proved, either in favor of or against the corporation, its officers, members or strangers, the contemporaneous corporate record of their action is competent, though not alone sufficient. It is very commonly the case that the act of a private corporation is not competent, unless shown to have been communicated to the other party; and in such case the books are competent to show the act, provided other evidence of communication is given to connect. The first question therefore to be determined is whether the corporate act is competent under the issue, and between the particular parties; if so, the min-

39. Morawetz on Priv. Corp., § 76.

40. Morawetz on Priv. Corp., § 75 and cases cited.

41. *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207.

42. *Weightman v. Washington*, 1 Black. 39.

utes may be resorted to as evidence of it.”⁴³ The records of a corporation are always admissible as self-serving admissions against its own existence.⁴⁴ But, in the absence of statute, they are not admissible against a stranger to connect him with the corporation.⁴⁵ This is in harmony with the rule that a party to an alleged contract may not use his own private records to establish it.⁴⁶ The records of a corporation are admissible against a party who has exercised the privileges of a stockholder.⁴⁷ And they are admissible to show an acceptance by the corporation of a proffered subscription.⁴⁸ Where a corporate record is recorded in a public office pursuant to law some courts hold that it constitutes conclusive evidence that a particular person is a shareholder of the corporation.⁴⁹ Other courts, however, hold that it constitutes only *prima facie* evidence of such fact.⁵⁰ The former courts hold that it constitutes an estoppel against the corporation, while the latter courts hold the contrary.

Altho the records of a corporation are admissible to show that a particular person is a stockholder, they may, as a rule, be rebutted by

43. Abbott on Trial Evid. p. 46.

44. Hudson v. Carman, 41 Me. 84.

45. White Mountains Ry. Co. v. Eastman, 34 N. H. 124 (tests of admissibility given).

46. Anchor Milling Co. v. Walsh, 37 Mo. App. 398.

47. White Mountains Ry. Co. v. Eastman, *supra*.

48. Colfax Hotel Co. v. Lyon, 69 Ia. 683.

49. Stratton v. Lyons, 53 Vt. 130.

50. Penobscot Ry. Co. v. White, 41 Me. 512, 66 Am. Dec. 257.

parol evidence.⁵¹ There are, however, exceptions to this rule.⁵² In the case of successive transfers of stock, where they do not appear upon the corporate records, creditors of the corporation may look to the party whose name appears on the records as owner; and the records are admissible to show this fact.⁵³ In Maine, the statute upon this point has been construed as making the records conclusive.⁵⁴ But in New York a statute relating to the right of stockholders to vote has been construed as allowing the court to go behind the transfer-book in attempting to determine whether a transfer was a sale or a pledge.⁵⁵

The records of a corporation, to be admissible in evidence, must appear to have been kept by an authorized person.⁵⁶ The mere fact that they are shown to be in the handwriting of the party who is alleged in the records to be the secretary of the corporation is not sufficient.⁵⁷ Certified cop-

51. *Mudgett v. Horrell*, 33 Cal. 25.

52. *Stanley v. Stanley*, 26 Me. 191 (subscriber assigned his stock, but no transfer made on the corporate records).

53. *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183.

54. *Stanley v. Stanley*, *supra*.

55. *Strong v. Smith*, 15 Hun (N. Y.) 222.

56. *Pittsburg Coal Co. v. Fosten*, 59 Pa. St. 365; *St. Louis, etc., Ry. Co. v. Eakins*, 30 Ia. 279.

57. *Highland Turnpike v. McKean*, 10 Johns. (N. Y.) 154, 16 Am. Dec. 324.

ies of the records,⁵⁸ and also sworn copies,⁵⁹ are admissible in evidence. But a copy certified by a stranger is inadmissible.⁶⁰ Moreover, a copy certified by a clerk, who is authorized to verify copies of the corporate records, but not to certify to facts, is not admissible as evidence of facts.⁶¹ It has been held that a medical diploma, obtained in a sister state, is inadmissible unless the legal existence of the college and the genuineness of the diploma are shown.⁶¹ Where the documents purport to be the articles and by-laws of a corporation they must be identified as such to be admissible.⁶² Records of a corporation may be identified by its clerk or secretary;⁶³ or by its treasurer, who is also a trustee.⁶⁴ And it has been held that any one who saw the entries made in the records may identify them.⁶⁵ Entries made on loose sheets of paper, at a stockholders'

58. *Mandel v. Swan Land, etc., Co.*, 154 Ill. 177, 40 N. E. R. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313; *Maynard v. Interstate Bldg., etc., Assoc.*, 112 Ga. 443, 37 S. E. R. 741; *Zimmerman v. Masonic Aid Assoc.*, 75 Fed. Rep. 236.

59. *Cantwell v. Welch*, 187 Ill. 275, 58 N. E. R. 414; *Ide v. Pierce*, 134 Mass. 260.

60. *Miller v. Johnston*, 71 Ark. 174, 72 S. W. R. 371.

61. *Parkerson v. Burke*, 59 Ga. 100.

62. *Wright v. Farmers' Mut. Live-Stock Ins. Assoc.*, 96 Ia. 360, 65 N. W. R. 308.

63. *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

64. *Illinois Conference, etc. v. Plagge*, 177 Ill. 431, 53 N. E. R. 76, 69 Am. St. Rep. 252.

65. *St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hilt. (N. Y.) 430.

meeting, when properly identified, have been held admissible.⁶⁶

§ 52. Records of municipal corporations.—

The existence of a municipal corporation is evidenced by its charter. Its acts, etc., are shown by its original records or by properly authenticated copies thereof.⁶⁷ Thus, its ordinances are proved by the book containing them, properly verified, or by duly certified copies.⁶⁸ The records of municipal corporations are admissible in evidence on similar grounds to those upon which other records are held admissible.⁶⁹ They are admissible not only as admissions against the corporation,⁷⁰ but also in behalf of the corporation.⁷¹ Unless a statute requires it, it is not essential that the minutes of a council meeting be recorded in a book to be admissible. If the minutes are approved by the council it is sufficient.⁷² If a statute prescribes that certain formalities accompany the passage of an ordinance, it is essential to show that the requirements of the statute were complied with;⁷³ but in the absence

66. *Vawter v. Franklin College*, 53 Ind. 88.

67. *Lindsay v. City of Chicago*, 115 Ill. 120.

68. *People v. Murray*, 57 Mich. 396; *Campbell v. St. Louis*, etc., Ry. Co., 175 Mo. 161.

69. *Farrel v. City of Dubuque*, 129 Ia. 447, 105 N. W. R. 696; *Chicago v. Greer*, 9 Wall. (U. S.) 726.

70. *Sharon v. Salisbury*, 29 Conn. 113.

71. *Troy v. Railroad Co.*, 11 Kan. 519, 13 Kan. 70; *School District v. Blakeslee*, 13 Conn. 227.

72. *O'Malley v. McGinn*, 53 Wis. 353, 10 N. W. R. 515.

73. *Larkin v. Burlington*, etc., Ry. Co., 85 Ia. 492, 52 N. W. R. 480.

of such a statute it is not essential to do so. In the latter case there is a presumption that the requirements prescribed in the charter were observed.⁷⁴

§ 53. **Reports of commercial agencies.**—Commercial agencies furnish to their patrons reports of the financial standing of business men. These reports, which are called "ratings," are not admissible in evidence against parties who take no part in making or publishing them.⁷⁵

§ 54. **Church records, etc.**—Church records of marriages, deaths, baptisms, etc., are usually held admissible as entries made in the regular course of business.⁷⁶ A record of baptism, however, which incidentally contains the date of birth of the child, is not admissible to show the latter fact.⁷⁷

§ 55. **Tax records. Post-office records. School records.**—These various classes of records, when duly authenticated, are admissible in evidence. Thus, books kept by county treasurers, assessors and collectors, while acting in their official capacities, are admissible to show *prima facie* their contents.⁷⁸ And records kept by the warden of a

74. *State v. King*, 37 Ia. 469; *O'Mally v. McGinn*, *supra*.

75. *Baker v. Ashe*, 80 Tex. 356, 16 S. W. R. 36; *Richardson v. Stringfellow*, 100 Ala. 416, 14 So. R. 283.

76. *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. R. 521; *Weaver v. Lennan*, 52 Md. 708; *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175.

77. *Kennedy v. Doyle*, 10 Allen (Mass.) 161.

78. *Anthony v. Mercantile, etc., Assoc.*, 162 Mass. 60; *Gage v. Davis*, 122 Ill. 520.

penetentiary;⁷⁹ a jailor; or school commissioner;⁸⁰ when duly authenticated, are admissible in evidence. Also those kept by a postmaster, pursuant to authority vested in him by the post office department.⁸¹

§ 56. **Records of secret societies.**—Unless required by law to be kept, records of secret societies are usually inadmissible.⁸² In some cases, however, they fall within an exception to the rule against hearsay. They have been held admissible to prove an act on the part of the society as a whole, even when unincorporated.⁸³ And also to prove the age of a member.⁸⁴

§ 57. **Entries contained in log-books.**—An act of congress provides that masters of vessels shall have log-books and record in them certain classes of entries, and in so far as the entries are within the scope contemplated by congress they are admissible in evidence.⁸⁵ Beyond this, they are not admissible to prove facts favorable to the master or owners of the vessel.⁸⁶ They may,

79. *Sandy White v. United States*, 164 U. S. 100.

80. *Momaghan v. School Dist.*, 38 Wis. 101.

81. *Merriam v. Mitchell*, 13 Me. 439.

82. *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294.

83. *Howard v. Russell*, 75 Tex. 171, 12 S. W. R. 525.

84. *Connecticut Mut. L. Ins. Co. v. Schwenk*, *supra*.

85. *Cameron v. Rich*, 5 Rich. (S.C.) 352, 52 Am. Dec. 747; *United States v. Sharp*, 27 Fed. Cas. No. 16,264, Pet. C. C. 118.

86. *United States v. Gibert*, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

however, be admissible as admissions.⁸⁷ It has been held that an entry in the log-book showing desertion is admissible to support a contention of forfeiture of wages.⁸⁸ The log-book, in general ought not to be admitted to establish any facts, save such as are contemplated by the act of congress. It is in no sense, *per se* evidence except in certain cases provided for by statute. It does not import legal verity; and in every other case is mere hearsay, not under oath. It may be used against persons, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defense. But it cannot be received as evidence for such persons or others, except by force of a statute rendering it so.⁸⁹

§ 58. Relevancy of letters and telegrams.—As a general rule, a letter or telegram is not admissible on behalf of the sender.⁹⁰ It is admissible, however, in so far as it constitutes admissions.⁹¹ Moreover, when the correspondence between the parties constitutes a contract it is admissible

87. United States v. Gibert, *supra*.

88. Jones v. The Phoenix, 13 Fed Cas. No. 7,489, 1 Pet. Adm. 201.

89. United States v. Gibert, *supra*.

90. Snow v. Warner, 10 Metc. (Mass.) 132, 43 Am. Dec. 417; Dewees v. Bluntzer, 70 Tex. 406, 7 S. W. R. 820; Honde v. Tolman, 42 Minn. 522, 44 N. W. R. 879.

91. Dick v. Zimmerman, 207 Ill. 636, 69 N. E. R. 754; White v. McNulty, 164 N. Y. 582, 58 N. E. R. 1094; Griffin, etc., Co. v. Joannes, 80 Wis. 601, 50 N. W. R. 785.

to prove the contract.⁹² And a letter is admissible in evidence where the purpose of introducing it is to show the intention of the writer, assuming that such intention is material to the issue.⁹³ But a letter by an agent to his principal containing self-serving assertions is not admissible against a third party.⁹⁴ The general principles of evidence pertaining to relevancy are applicable to letters and telegrams.⁹⁵ Where a letter calls for an answer, and the addressee fails to answer,⁹⁶ or replies only in part,⁹⁷ it may be admissible against him. But where the addressee is under no obligation to reply, the letter addressed to him is not admissible as an admission against him.⁹⁸ Where a party has introduced in evidence letters addressed to him, he may introduce letters previously sent by him to which the former letters were replies, where his purpose in doing so is to explain the contents of the letters received by him.⁹⁹ A letter or telegram is admissible to show that notice was duly given, or that

92. *Sanborn v. Nockin*, 20 Minn. 178; *Shaw v. Davis*, 7 Mich. 318; *Thames L. & T. Co. v. Beville*, 100 Ind. 309.

93. *New York Mut. L. Ins. Co. v. Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706.

94. *Ins. Co. v. Guardiola*, 129 U. S. 642.

95. *Percy v. Bibber*, 134 Mass. 404; *Mobile, etc., Ry. Co. v. Jay*, 65 Ala. 113.

96. *Whitaker v. White*, 69 Hun (N. Y.) 258.

97. *Beach v. Travelers' Ins. Co.*, 73 Conn. 118, 46 Atl. R. 867.

98. *Thomas v. Gage*, 141 N. Y. 506, 36 N. E. R. 385.

99. *Buffum v. York Manuf. Co.*, 175 Mass. 471, 56 N.E.R. 599.

a demand was duly made.¹⁰⁰ Where a letter is introduced in evidence the party introducing it may read only part of it.¹ In an action on a life insurance policy, letters by the company, denying its liability may be admissible.² Letters containing threats have been frequently held admissible. Thus, where the defendant in a criminal case admitted to a brother of the deceased that he wrote a letter to the former, in which he threatened to kill both the deceased and his brother, the letter was held admissible to show the threat.³

100. *Struthers v. Drexel*, 122 U. S. 487; *Merrill v. Downs*, 41 N. H. 72; *Swan v. West*, 41 Miss. 104.

1. *Lester v. Piedmont, etc., L. Ins. Co.*, 55 Ga. 475; *Raphael v. Hartman*, 87 Ill. App. 634.
2. *Prudential Ins. Co. v. Devoe*, 98 Md. 584, 56 Atl. R. 809.
3. *Westbrook v. People*, 126 Ill. 81, 18 N. E. R. 304.

CHAPTER II.

Alteration of Documents.

§ 1. **In general.**—Alteration of a document is an act done upon it which changes, either materially or immaterially, its language or meaning.¹ A material alteration is one which changes the legal effect of the document. It “causes it to speak a language different in legal effect from

1. *Moore v. Macon Sav. Bank*, 22 Mo. App. 684; *Morrill v. Otis*, 12 N. H. 466.

that which it originally spake.”² An immaterial alteration is one which does not change the legal effect of the document. One “where neither the rights nor interests, duties nor obligations, of either of the parties are in any manner affected or changed.”³ An alteration may consist of an addition, an interlineation, or an erasure. When it is made without the consent or connivance of a party to the document it is called a “spoliation.” Technically speaking, a spoliation is not regarded as an alteration in the legal sense.⁴

§ 2. **Effect of alterations.**—The effect of an alteration in a document depends upon the circumstances of the particular case. According to the early English rule even spoliation, if in a material part, avoided the instrument. It was so held in Henry Pigot’s case.⁵ Moreover, it was held in that case that “if the obligee himself alters the deed by any of said ways (interlineation, addition, erasing or drawing a pen thru a word), altho it is in words not material, yet the deed is void.” And this rule was applied to contracts as well as to sealed instruments.⁶ Lord

2. *Murray v. Klinzing*, 64 Conn. 78. See also, *Morrill v. Otis*, *supra*; *Wheelock v. Freeman*, 13 Pick. (Mass.) 168, 23 Am. Dec. 674.

3. *Smith v. Crooker*, 5 Mass. 538.

4. *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598, 97 Am. Dec. 443.

5. 11 Coke Rep. 27. See also, 86 Am. Rep. 102 *et seq.*

6. *Davidson v. Cooper*, 11 M. & W. 778, 13 M. & M. 343; *Powell v. Divett*, 15 East 29. See also note, 86 Am. St. Rep. 102 *et seq.*

Coke held that even a spoliation made before the execution of the document invalidated the instrument.⁷ This early rule, however, has been severely criticised. Moreover, it has been wholly repudiated in this country, and in England much relaxed. Story, J., in speaking of it says, "a doctrine so repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought to have the unequivocal support of unbroken authority before a court of law is bound to surrender its judgment to what deserves no better name than a technical quibble."⁸ According to the modern rule an alteration made by a stranger, altho made in a material part, does not effect the validity of the instrument.⁹

As regards the effect of immaterial alterations the decisions are somewhat conflicting. Some of the older decisions hold that even an immaterial alteration, by a party to the instrument,

7. Coke upon Littleton, 225 b.

8. United States v. Spalding, 2 Mason (U. S.) 478. See also to same effect, Ames v. Brown, 22 Minn. 257; Bel-
lows v. Weeks, 41 Vt. 590; Aldous v. Cornwall, L. R. 3
Q. B. 573. For general discussions of the subject see
notes, 17 Am. Rep. 97-106; 25 Am. Rep. 481-484; 86
Am. St. Rep. 80-134.

9. Fisher v. King, 153 Pa. St. 3; Fuller v. Green, 64 Wis.
159; Gleason v. Hamilton, 138 N. Y. 353, and cases cited.

made with *fraudulent intent*, invalidates it.¹⁰ Upon this point Lord Kenyon said, "No man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected."¹¹ The trend of recent decisions, however, is to the contrary. If the act itself does not affect materially the legal significance of the instrument the motive for it does not affect the rights of the parties.¹² If the act itself is wholly immaterial the intent with which it is done is also immaterial. This is undoubtedly the better view.

§ 3. **Material alterations.**—A material alteration in a document is one which causes it to speak a language different in legal effect from that which it originally spoke.¹³ Mr. Daniel says "that any change in the terms of a written contract which varies its original legal effect and operation, whether in respect to the obligation it imports, or to its force as a matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the parties to the contract gave their express or implied consent to such change. And the *effect* of such alteration

10. *Hunt v. Gray*, 35 N. J., 10 Am. Rep. 232; *First Nat. Bank v. Frickle*, 75 Mo. 178, 42 Am. Rep. 397.

11. See *Hunt v. Gray*, *supra*.

12. *Robinson v. Phoenix Ins. Co.*, 25 Ia. 430; *Fuller v. Green*, 64 Wis. 159, 24 N. W. R. 907, 54 Am. Rep. 600; *Miller v. Gilleland*, 19 Pa. St. 119.

13. *White S. M. Co. v. Saxon*, 121 Ala. 399, 25 So. R. 784; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97, 37 S. W. R. 490.

is to nullify and destroy the altered instrument as a legal obligation, whether made with fraudulent intent or not."¹⁴ And Mr. Stephen says, "An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever."¹⁵ The following alterations have been held material: erasing or adding signatures;¹⁶ erasing or inserting the place of payment;¹⁷ changing the date of the document;¹⁸ changing the consideration;¹⁹ inserting the words "waive notice and protest" over an indorsement;²⁰ adding the word "junior" to a signature, or erasing it

14. Daniel, Neg. Instr. (5th ed.), § 1373. See also to same effect, *Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Adair v. England*, 58 Ia. 314; *Mersman v. Werges*, 112 U. S. 139. For full note on the subject see 86 Am. St. Rep. 80-134.
15. Steph. Evid., art. 89. See also, *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97, 37 S. W. R. 490; *White S. M. Co. v. Saxon*, 121 Ala. 399, 25 So. R. 784.
16. *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727; *Sullivan v. Rudisill*, 63 Ia. 158; *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Mason v. Bradley*, 11 M. & W. 590. See also note, 86 Am. St. Rep. 91 *et seq.*
17. *Baugh v. Anderson*, 91 Ga. 831; *Winter v. Pool*, 100 Ala. 503. See also 10 Am. Dec. 239 and note.
18. *McCormick Harv. Mach. Co. v. Lauber*, 7 Kan. App. 730, 52 Pac. R. 577; *Taylor v. Taylor*, 12 Lea (Tenn.) 714. See also notes 71 Am. Dec. 724; 86 Am. St. Rep. 99.
19. *Waterman v. Vose*, 43 Me. 504; *Green v. Snead*, 101 Ala. 205. See also note, 86 Am. St. Rep. 96.
20. *Davis v. Eppler*, 38 Kan. 629.

therefrom;²¹ changing the rate of interest, or mode of paying it;²² making a non-negotiable note negotiable;²³ changing the description of property;²⁴ changing the time of payment;²⁵ adding the name of a witness;²⁶ changing the name of the grantee,²⁷ or payee;²⁸ changing the name of the maker of a note or the drawer of a bill of exchange;²⁹ adding "and Co." to the name of the maker;³⁰ erasing the term "surety" after an obligor's name;³¹ adding the term "cashier" to the payee's name;³² substituting "bearer"

21. *Broughton v. Fuller*, 9 Vt. 373; *contra*, *Cort v. Starkweather*, 8 Conn. 289.
22. *Heath v. Blake*, 28 S. C. 406; *Gwin v. Anderson*, 91 Ga. 831.
23. *Needles v. Shaffer*, 60 Ia. 65; *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369. See also note, 86 Am. Rep. 95 *et seq.*
24. *Sherwood v. Merritt*, 83 Wis. 233; *Hollingsworth v. Holbrook*, 80 Ia. 151.
25. *Wyman v. Yeomans*, 84 Ill. 403; *Steinan v. Moody*, 100 Ga. 136, 28 S. E. R. 30; *Lisle v. Rogers*, 57 Ky. 528.
26. *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169.
27. *Abbott v. Abbott*, 189 Ill. 488, 82 Am. St. Rep. 470, 59 N. E. R. 958.
28. *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. R. 1022; *Stoddard v. Penniman*, 108 Mass. 366, 11 Am. Rep. 363.
29. *Sharpe v. Bellis*, 61 Pa. St. 69, 100 Am. Dec. 618 *Sheridan v. Carpenter*, 61 Me. 93.
30. *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 So. R. 498.
31. *Humphreys v. Crane*, 5 Cal. 173; *Laub v. Paine*, 46 Ia. 550, 26 Am. Rep. 163.
32. *Hodge v. Farmers' Bank*, 7 Ind. App. 94, 34 N. E. R. 123.

for "or order," or *vice versa*,³³ changing the amount;³⁴ changing the place of payment;³⁵ adding or erasing the words "in specie," or "payable in gold";³⁶ changing the subject matter by making it less, more or different;³⁷ adding or removing a seal (in jurisdictions where seals are still used);³⁸ adding or erasing a provision for attorney's fees;³⁹ inserting a consideration⁴⁰ (but not where the sole purpose is to show the real consideration paid,⁴¹ or merely to show that a valuable consideration is paid or to be paid⁴²); adding the words "more or less" to the quantity

33. *McCauley v. Gordon*, 64 Ga. 221, 37 Am. Rep. 68; *Crosswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. R. 331.
34. *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. R. 907; *Green v. Sneed*, 101 Ala. 205, 46 Am. St. Rep. 119, 13 So. R. 277, *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. R. 52.
35. *Pelton v. San Jacinto, etc., Co.*, 113 Cal. 21, 45 Pac. R. 12; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. R. 569.
36. *Bogarth v. Breedlove*, 39 Tex. 561; *Darwin v. Rippey*, 63 N. C. 318.
37. *Willard v. Ostrander*, 51 Kan. 481, 37 Am. St. Rep. 294, 32 Pac. R. 1092; *Richardson v. Fellner*, 9 Okla. 513, 60 Pac. R. 270; *Osborne v. Van Houten*, 45 Mich. 444, 8 N. W. R. 77.
38. *Evans v. Williams*, 79 N. C. 86; *Rawson v. Davidson*, 49 Mich. 607, 14 N. W. R. 565.
39. *Coles v. Yorks*, 28 Minn. 464, 10 N. W. R. 775; *First Nat. Bank v. Laughlin*, 4 N. Dak. 391, 61 N. W. R. 473.
40. *Low v. Argrove*, 30 Ga. 129.
41. *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. R. 244.
42. *Reed v. Kemp*, 16 Ill. 445.

of land contracted to be conveyed;⁴³ increasing the amount of attorney's fees specified;⁴⁴ changing a joint and several promise into a joint promise⁴⁵ (but not where a joint promise is changed into a joint and several promise⁴⁶); adding "f. o. b. cars at mine" to a contract for purchase and sale of coal.⁴⁷

§ 4. **Immaterial alterations.**—An immaterial alteration is one which does not affect the rights, interests, duties or obligations of either of the parties to the document.⁴⁸ The following alterations have been held immaterial: erasing the middle initial of a person's name;⁴⁹ adding the words "together with 10 per cent. attorney's fees" to a *penal* bond;⁵⁰ noting on a bill of exchange the residences of the drawer and indorsers;⁵¹ adding or erasing terms which may be supplied by construction;⁵² altering the serial

43. *Sherwood v. Merritt*, 83 Wis. 233, 53 N. W. R. 512.

44. *Burwell v. Orr*, 84 Ill. 465.

45. *Humphreys v. Guillo*, 13 N. H. 385; *Ecbert v. Louis*, 84 Ind. 99. *Contra*, *Eddy v. Bond*, 19 Me. 461

46. *Kline v. Raymond*, 70 Mo. 271; *Landaner v. Sioux Falls Imp. Co.*, 10 S. Dak. 205, 72 N. W. R. 467; *Miller v. Reed*, 27 Pa. St. 244, 67 Am. Rep. 459.

47. *Brady v. Berwind-White Coal M. Co.*, 94 Fed. R. 28.

48. *Smith v. Crooker*, 5 Mass. 538; *Arnold v. Jones*, 2 R. I. 345.

49. *Banks v. Lee*, 73 Ga. 25.

50. *White Sewing Machine Co. v. Dakin*, 86 Mich. 581, 49 N. W. R. 583, 13 L. R. A. 313.

51. *Struthers v. Kendall*, 41 Pa. St. 214, 80 Am. Dec. 610.

52. *Sanitary Dist. v. Allen*, 178 Ill. 330, 53 N. E. R. 109; *Hunt v. Adams*, 6 Mass. 519 ("It would be unworthy the

numbers on bonds, coupons, etc.;⁵³ inserting on back of a note the interest due and also total amount due;⁵⁴ inserting in a note the rate of interest agreed upon;⁵⁵ inserting the name of a subscribing witness agreed upon;⁵⁶ putting the sign "\$" before figures meant to represent dollars;⁵⁷ changing the marginal figures to make them harmonize with the written words in the body of the document;⁵⁸ changing the wording of the document without affecting the sense or legal effect of the instrument;⁵⁹ inserting an immaterial date;⁶⁰ erasing his name, by an indorser, from the face of a note and inserting it on the back;⁶¹ inserting the word "at"⁶² before the bank named as the place of payment;⁶² inserting a memorandum at the foot of a note designating a particular place at which it

wisdom of the law to decide that an incautious interlineation of a word, which the same law would necessarily imply, should defeat the contract"); *Briscoe v. Reynolds*, 51 Ia. 673, 2 N.W.R. 529; *Burnham v. Ayer*, 35 N. H. 351.

53. *Com. v. Emigrant Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126; *State v. Cobb*, 64 Ala. 127, 157; *Noteholders v. Funding Board*, 84 Tenn. 46, 57 Am. Rep. 211.
54. *Watertown Steam Engine Co. v. Tex. Civ. App.*, 24 S. W. R. 657.
55. *First Nat. Bank v. Carson*, 60 Mich. 432.
56. *Fuller v. Green*, 64 Wis. 159.
57. *Houghton v. Francis*, 29 Ill. 244.
58. *Smith v. Smith*, 1 R. I. 398, 53 Am. Dec. 652.
59. *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293.
60. *Inglish v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96.
61. *Reilly v. First Nat. Bank*, 148 Ill. 349, 35 N. E. R. 1120.
62. *Simmins v. Atkinson*, 69 Miss. 862, 12 So. R. 263, 23 L. R. A. 59.

is payable;⁶³ inserting the word "months" in the clause "twenty-four after date";⁶⁴ inserting in a note a provision for the payment of current exchange, or express charges for transmitting the money to the place of payment;⁶⁵ adding words which particularize a general description;⁶⁶ adding words which merely cure an imperfect description;⁶⁷ inserting or striking out a consideration where the consideration is immaterial;⁶⁸ inserting the real consideration paid;⁶⁹ tearing from a note a memorandum stating that certain persons had signed the note as sureties;⁷⁰ inserting in a note, given to a physician for professional services, the words "for labor";⁷¹ erasing the name of the acting sheriff from a bond and inserting the name of the ob-

63. *Amer. Nat. Bank v. Bangs*, 42 Mo. 450, 97 Am. Dec. 349; *Williams v. Waring*, 10 Barn. & C. 2, 21 Eng. C. L. 11.

64. *Conner v. Routh*, 7 How. (Miss.) 176, 40 Am. Dec. 59.

65. *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356 (surety's liability unaffected).

66. *Churchill v. Beilstein*, 9 Tex. Civ. App. 445, 29 S.W.R. 392.

67. *Sharpe v. Orme*, 61 Ala. 263; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Brown v. Pinkham*, 18 Pick. (Mass.) 172.

68. *Westmoreland v. Westmoreland*, 91 Ga. 233, 17 S. E. R. 1033.

69. *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. Rep. 244.

70. *Humphreys v. Crane*, 5 Cal. 173 ("The defendants were liable to the plaintiff, whether they signed as principals or sureties, and it is well settled that an alteration which does not vary the meaning, the nature or the subject matter of a contract, is immaterial).

71. *Magers v. Dunlap*, 39 Ill. App. 618.

ligee who was to be protected by its execution;⁷² adding the christian names of the drawers to a bill of exchange;⁷³ correcting the name of a party to the document;⁷⁴ adding a mere description of a person.⁷⁵ It has been held that adding a clause which makes a note payable at a certain bank is an immaterial alteration.⁷⁶ This view, however, is erroneous, and the contrary is supported by the great weight of authority.⁷⁷ Changing "I promise" to "We promise" has been held immaterial.⁷⁸

§ 5. **Effect of alteration of memoranda.**—The effect of making a material alteration in a memorandum depends upon whether the parties in-

72. *Turner v. Billagrain*, 2 Cal. 520. See also *Hale v. Russ*, 1 Me. 334.
73. *Blair v. Bank of Tenn.*, 11 Humph. (Tenn.) 84 ("The omission of the christian names of the drawers was one which the law supplied, and which did not affect their liability to the acceptor or other parties.")
74. *Outtown v. Dulin*, 72 Md. 536, 20 Atl. R. 134; *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. R. 551; *State v. Dean*, 40 Mo. 464.
75. *Casto v. Evinger*, 17 Ind. App. 298, 46 N. E. R. 648; *Coit v. Starkweather*, 8 Conn. 289 (adding "Junior" to a man's name).
76. *Etz v. Place*, 81 Hun (N. Y.) 203, 30 N. Y. Supp. 765; *Major v. Hansen*, 2 Biss. 195, Fed. Cas. No. 8982.
77. *Pelton v. San Jacinto, etc., Co.*, 113 Cal. 21, 45 Pac. R. 12; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. R. 569; *Charlton v. Reed*, 61 Ia. 166, 47 Am. Rep. 808, 16 N. W. R. 64; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318.
78. *Eddy v. Bond*, 19 Me. 461, 36 Am. Dec. 767. *Contra*, *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 767.

tended it to constitute a part of the document or not. If they did, the alteration avoids the contract; otherwise not.⁷⁹ The difficulty frequently is to determine the intention. Unless there is clear proof to the contrary, a presumption exists that the memorandum was intended to constitute a part of the contract.⁸⁰ Altho an indorsement on a note is considered a new and separate contract, an alteration of which does not vitiate the note itself,⁸¹ yet a memorandum on the back of an instrument may constitute a part of it, in which case a material alteration of the memorandum will avoid the instrument.⁸²

§ 6. Alteration by an executor or administrator.—An executor or administrator is pecuniarily interested in a document which forms part of the decedent's estate; and a material alteration of it by the executor or administrator avoids the document. "The administrator of a decedent is the title holder of the personal assets of the estate for the purpose of administration, and has a pecuniary interest in them for the commission allowed by law. The plaintiff in this case was not a stranger to the note, and the first change made by him was a material alteration, not a spolia-

79. *Brown v. Reed*, 79 Pa. St. 570, 21 Am. Rep. 75; *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. R. 382; *Cornell v. Nebeker*, 48 Ind. 463.

80. *Johnson v. Heagan*, 23 Me. 329.

81. *Howe v. Thompson*, 11 Me. 152.

82. *Dinsmore v. Duncan*, 57 N. Y. 579, 15 Am. Rep. 534; *Johnston v. May*, 76 Ind. 293.

tion, which avoided the instrument against the maker."⁸³

§ 7. Alteration by a special agent.—An agent who has mere authority to receive a note for his principal is not presumed to have authority to alter it. It follows, therefore, that an unauthorized material alteration of the note by such agent amounts only to a spoliation, and does not avoid the instrument.⁸⁴

§ 8. Alteration by a thief.—A thief is not a "holder" of a document which he has stolen. Hence an alteration of it by him is a mere spoliation and does not avoid the instrument.⁸⁵

§ 9. Alteration by a co-obligor.—An alteration by the principal obligor, either before or after negotiation, discharges a surety or an accommodation indorser.⁸⁶ An obligor has no implied authority to alter a document after a co-obligor

83. *McMurtrey v. Sparks*, 71 Mo. App. 126.

84. *Perkins Windmill Co. v. Tillman*, 55 Neb. 652, 75 N. W. R. 1098; *Hunt v. Gay*, 35 N. J. L. 227, 10 Am. Rep. 232; *Langenberger v. Kroeger*, 48 Cal. 147, 17 Am. Rep. 418. See also, *Hollingsworth v. Holbrook*, 80 Ia. 151, 20 Am. St. Rep. 411, 45 N. W. R. 561.

85. *Elizabeth v. Force*, 29 N. J. Eq. 587; *Dinsmore v. Duncan*, 57 N. Y. 573, 15 Am. Rep. 534; *Com. v. Emigrant Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126. *Contra*, *Colson v. Arnot*, 57 N. Y. 253, 15 Am. Rep. 496.

86. *Stoddard v. Penniman*, 108 Mass. 366, 11 Am. Rep. 363; *Waterman v. Vose*, 43 Me. 504; *State v. Churchill*, 48 Ark. 426, 3 S. W. R. 352, 380; *Bradley v. Mann*, 37 Mich. 1.

has signed it.⁸⁷ The relation of the parties does not give rise in such case to an implied agency.⁸⁸ And the same principle applies where a surety intrusts the document to the principal obligor to deliver or negotiate.⁸⁹

§ 10. **Authority from holder.**—An alteration by an agent who has received express authority from the holder to make it avoids the instrument. Such cases, however, are comparatively rare. And an alteration by an agent who has received implied authority from the holder to make it also avoids the document. The difficulty frequently experienced in such cases is in determining whether an implied agency existed or not. As fraud is not presumed, there is no presumption in favor of such agency; and the burden of proving it rests upon the party alleging it.⁹⁰

§ 11. **Alteration by a public officer.**—As a general rule, an alteration of a bond or other docu-

87. *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. R. 1113.

88. *Neff v. Horner*, 63 Pa. St. 327, 3 Am. Rep. 555; *Jones v. Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664; *Stoddard v. Peniman*, *supra*.

89. *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. R. 115; *Blakey v. Johnson*, 13 Brush (Ky.) 197, 26 Am. Rep. 254; *Hagler v. State*, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. R. 692.

90. *White Sewing Machine Co. v. Dakin*, 86 Mich. 581, 49 N. W. R. 583; *Hunt v. Gray*, *supra*; *Hollingsworth v. Holbrook*, *supra*; *Mathias v. Leathers*, 99 Ia. 18, 68 N. W. R. 449.

ment by a public officer, where it is intrusted to him in his official capacity, avoids the instrument. It has been contended that the public officials of a municipality are not its agents when they commit wrongful acts in the performance of a public duty imposed upon them by statute.⁹¹ But the courts hold that this contention is not applicable where a public officer makes material alterations in penal bonds, etc., which have been intrusted to him in his official capacity.⁹² "To be relieved from a liability incurred through the unauthorized and unlawful act of a public officer is one thing—to enforce as a valid subsisting claim a bond which has been vitiated with the consent of those who rightfully had it in keeping on behalf of the town is quite another."⁹³

§ 12. **Filling in blanks.**—The effect of filling in blanks, as regards avoiding the instrument, depends upon the circumstances of the particular case. Where the maker executes the instrument leaving blanks to be filled in a certain way by another person, and the latter exceeds his authority, the instrument is avoided as between the maker and the person who fills in the

91. *Dover v. Robinson*, 64 Me. 183.

92. *Wegner v. State*, 28 Tex. App. 419, 13 S. W. R. 608.

93. *Dover v. Robinson*, *supra*.

94. *Couger v. Crabtree*, 88 Ia. 536, 45 Am. St. Rep. 249, 55 N. W. R. 335; *State v. Mathews*, 44 Kan. 596, 25 Pac. R. 36; *Green v. Sneed*, 101 Ala. 205, 46 Am. St. Rep. 119, 13 So. R. 277.

blanks.⁹⁵ It has been held; however, that in such case the maker is still liable on the original debt.⁹⁶

Where the instrument is negotiable, and has passed into the hands of a *bona fide* purchaser, who took it without knowledge that the agent who filled in the blanks exceeded his authority, the instrument is valid; and the *bona fide* purchaser is entitled to recover its face value.⁹⁷ "No rule is better settled or founded upon stronger reasons than that which affirms the liabilities of one intrusting his name in blank to another, to the full extent to which such other may see fit to bind him, when the paper is taken in good faith and without notice, actual or implied, that the authority given had been exceeded, or that the confidence reposed had been abused."⁹⁸

As regards the effect of filling in blanks in sealed instruments the decisions are in hopeless

95. *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722 ("When express authority is given to fill the blanks in one respect only, that authority must be pursued and no other can be exercised.")
96. *Johnson v. Blasdale*, 9 Miss. 17, 40 Am. Dec. 85; *Fisher v. Dennis*, 6 Cal. 577, 65 Am. Dec. 534 (These cases, however, put the right of recovery on a wrong ground. They hold that the instrument is avoided only as to the excess. In doing so they confuse two subjects which are not at all connected.)
97. *Woolfolk v. Bank of America*, 73 Ky. 504; *Waldron v. Young*, 56 Tenn. 777; *State v. Mathews*, *supra*; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Michigan Bank v. Eldrid*, 9 Wall. (U. S.) 544.
98. *Fullerton v. Sturges*, 4 Ohio St. 529.

conflict. Lord Mansfield held that parol authority to fill blanks in sealed instruments was sufficient. Baron Parke, however, repudiated this rule.⁹⁹ And the modern English rule is in harmony with Baron Parke's view.¹⁰⁰ In this country some courts have followed Lord Mansfield's rule,¹ while others have followed Baron Parke's.²

§ 13. Rights of bona fide holders in other cases.—An unauthorized material alteration of a negotiable instrument by the payee, or an indorsee, avoids the instrument as to the maker; and also even as to a *bona fide indorser* for value and without notice, provided his indorsement *preceded* the alteration.³ On the other hand, a *bona fide* indorsee may in such case, recover from an indorser who became such *after* the alteration.⁴

§ 14. When alteration not prejudicial to obligor.—If the alteration is material, the fact that it is not prejudicial to the obligor is unimportant. Even when beneficial to him it avoids the docu-

99. *Hibblewhite v. M'Morine*, 6 M. & W. 200.

100. *Enthoven v. Hoyle*, 9 Eng. L. & Eq. 434.

1. *Swartz v. Ballou*, 47 Ia. 188; *Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535.

2. *Burns v. Lynde*, 6 Allen (Mass.) 305; *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549.

3. *Capital Bank v. Armstrong*, 62 Mo. 59; *Burwell v. Orr*, 84 Ill. 465; *Greenfield Savings Bank v. Stowell*, 123 Mass. 198.

4. *Washington Sav. Bank v. Ecky*, 51 Mo. 272.

ment.⁵ And especially so when he is a surety.⁶ Moreover, the fact that it operates disadvantageously to the wrongdoer is immaterial. Thus, where the holder of a promissory note makes an alteration in it which diminishes the amount of interest, his act renders the note void.⁷

§ 15. **Effect on negotiable instruments.**—The effect of a material alteration of a negotiable instrument is the same as in the case of any other contract.⁸ It renders the instrument void, even in the hands of a *bona fide* indorsee.⁹ And this rule is applicable to bills of exchange¹⁰ and checks¹¹ as well as to promissory notes. Many

5. *Hewins v. Cargill*, 67 Me. 554; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Montgomery v. Crossstwait*, 90 Ala. 553.
6. *Sturges v. Williams*, 9 Ohio St. 443, 75 Am. Dec. 473; *Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Hartley v. Carboy*, 150 Pa. St. 23; *Nat. Ulster Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633. See also notes, 86 Am. St. Rep. *et seq.*
7. *First Nat. Bank v. Hall*, 83 Ia. 645, 50 N. W. R. 944; *Palmer v. Poor*, 121 Ind. 135.
8. *Vanauken v. Hornbeck*, 14 N. J. L. 182; *Letcher v. Bates*, 6 J. J. Marsh (Ky.) 524, 22 Am. Dec. 92; *Gardner v. Walsh*, 5 El. & Bl. 83, 85 E. C. L. 83.
9. *Burwell v. Orr*, 84 Ill. 465; *Greenfield Sav. Bank v. Stowell*, *supra*; *Capital Bank v. Armstrong*, 62 Mo. 59; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. St. 564; *Horn v. City Bank*, 32 Kan. 518; *Knoxville Nat. Bank v. Clark*, 51 Ia. 264, 33 Am. Rep. 129.
10. *Master v. Miller*, 4 T. R. 320, 2 H. Bl. 141.
11. *Belknap v. Nat. Bank of North America*, 100 Mass. 376; *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *St. Louis Third Nat. Bank v. Allen*, 59 Mo. 310.

cases hold, however, that where the note, bill or check is so negligently drawn that alteration without detection is thereby facilitated, the maker is liable on the instrument in its altered condition where it has been transferred to a *bona fide* purchaser.¹² But some courts hold the contrary.¹³ It has been held that where a bill of exchange has been materially altered after acceptance a *bona fide* indorsee may recover from his indorser the consideration paid him for the bill; and that this indorser, if not the wrongdoer, may recover from his indorser the consideration paid him for the bill; and so on until the wrongdoer is reached.¹⁴ As a general rule, however, a *bona fide* indorsee cannot recover on the instrument from the maker, or any indorser prior to the one responsible for the alteration. It is to be observed, however, that the alteration will not relieve a *subsequent* indorser from liability to his indorsee.¹⁵ A material alteration of a certified check by the drawer relieves the bank from liability either to the drawer or his assignee.¹⁶

12. Iron Mountain Bank v. Murdock, 62 Mo. 70; Seibel v. Vaughan, 69 Ill. 257; Brown v. Reed, 79 Pa. St. 370, 21 Am. Rep. 75.

13. Simmons v. Atkinson, etc., Co., 69 Miss. 862; Fordyce v. Kosminski, 49 Ark. 40, 4 Am. St. Rep. 18.

14. Burchfield v. Moore, 3 El. & Bl. 683, 77 E. C. L. 683, 25 Eng. L. & Eq. 123.

15. Washington Sav. Bank v. Ecky, 51 Mo. 272.

16. Abrams v. Union Nat. Bank, 31 La. Ann. 61; *In re Commercial Bank*, 10 Manitoba Rep. 171.

§ 16. **Same. Effect on accommodation paper.**—Where a person puts his name on a bill or note for the accommodation of another, and the latter makes an unauthorized material alteration of it before it is negotiated, the former party is relieved from liability even as to a *bona fide* indorsee of the instrument.¹⁷ Of course, if the payee has knowledge of the alteration the accommodation maker is not liable.¹⁸ The rule is the same, however, whether he has knowledge or not. Where the alteration in a promissory note is made by the maker, without the knowledge or consent of the accommodation payee, with knowledge of the transferee and in his presence, the accommodation payee who indorses it to the transferee is relieved from liability.¹⁹ Where the payee of the note alters it without the knowledge of the indorser, but with the consent of the maker, the indorser is not liable on the note.²⁰ The alteration of a judgment note, after judgment thereon has been entered, does not invali-

17. *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92; *Ohio Valley Bank v. Lockwood*, 13 W. Va. 392; *Hert v. Oehler*, 80 Ind. 83; *Aetna Nat. Bank v. Winchester*, 43 Conn. 391; *Halcrow v. Kelly*, 28 U. C. C. P. 551.

18. *Hartley v. Corboy*, 150 Pa. St. 23; *Flanigan v. Phelps*, 42 Minn. 186; *Thompson v. Massie*, 41 Ohio St. 307; *Johnston v. May*, 76 Ind. 298.

19. *Sturges v. Williams*, 9 Ohio St. 443, 75 Am. Dec. 473.

20. *Townsend v. Star Wagon Co.*, 10 Neb. 615, 35 Am. Rep. 493; *Pahlman v. Taylor*, 75 Ill. 629; *Fulmer v. Seitz*, 68 Pa. St. 237, 8 Am. Rep. 172.

date the judgment.²¹ Where sureties sign a note for the accommodation of the principal maker, and the latter and one of several joint payees materially alter it, the sureties are relieved from liability.²²

§ 17. **Same. Effect where alteration is made with fraudulent intent.**—As a general rule, the effect of making an unauthorized material alteration by a party to the instrument, is, as previously stated, to render the instrument void. And ordinarily the intent with which it is made is immaterial. But where the action is brought on the *original debt*, and not on the instrument, the intent with which the alteration is made may materially affect the rights of the parties. Some courts hold that where the alteration is made by mistake, and with no fraudulent intent, the action will lie.²³ Other courts hold that even in such case no action will lie unless it appear that the original obligation is separate and distinct from the instrument. In other words, that where the original obligation is merged in the instrument no action can be based upon it.²⁴

§ 18. **Important distinction between executory and executed documents.**—An important distinction exists between the effect of an unauthorized material alteration of a document which evi-

21. *Kimmel's Appeal*, 91 Pa. St. 471.

22. *Thompson v. Massie*, 41 Ohio St. 307.

23. *Eckert v. Pickle*, 59 Ia. 545; *Clough v. Seay*, 49 Ia. 111; *Hunt v. Gray*, 35 N. J. 227, 10 Am. Rep. 232.

24. *Booth v. Powers*, 56 N. Y. 22.

dences an executory contract and one which does not. In the former case the alteration avoids the instrument whether the alteration is fraudulent or not; while in the latter case the alteration, altho fraudulent, does not avoid what has been done.²⁵ Thus, a material alteration of a bill of sale after delivery of the goods does not divest the vendee of the right of possession.²⁶ And erasures of the names of some of the creditors from the schedule, in the case of a deed of assignment for the benefit of creditors, will not revest the title to the property in the debtor. As said by Alderson, B., "Here, at the time when the deed was executed by the plaintiff (the debtor), the property passed; what is there to revest it?"²⁷ But where a tenant makes an unauthorized material alteration in the lease his rights in the premises are gone. He may not retain possession, nor prevent the landlord from entering the premises.²⁸ On the other hand, if the lease is executed in duplicate, and each party has a copy, an alteration by the tenant of his copy will not divest him of the estate.²⁹ And, as a general rule, where the alteration is made after

25. *Cochran v. Nebeker*, 48 Ind. 459; *Kendall v. Kendall*, 12 Allen (Mass.) 92. See also Bishop on Contracts, § 758.

26. *Ransier v. Vanorsdol*, 50 Ia. 130.

27. *West v. Steward*, 14 M. & W. 47.

28. *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165.

29. *Jones v. Hoard*, 59 Ark. 42; *Lewis v. Payn*, 8 Cow. (N.Y.) 71, 18 Am. Dec. 427.

the property is conveyed the interest transferred is not affected.³⁰

§ 19. **Effect of material alteration of a deed of land.**—The cancellation or destruction of a deed of land does not reconvey the title to the grantor. Hence a material alteration in the deed by the grantee, after delivery to him, does not, as a rule, divest him of the title.³¹ It destroys his right, however, to sue on the covenants in the deed.³² The fact that the deed is recorded, after alterations of it by the grantee, does not, ordinarily, change the rule. It has been held, however, that where the grantee alters the deed by substituting other grantees before recording it, this will not prevent a subsequent deed by the grantor from passing title to a different grantee.³³

§ 20. **Effect of material alteration of a real estate mortgage.**—In England, a mortgage in fee transfers the legal title; and in that country the effect of an unauthorized material alteration of a mortgage by the mortgagee is the same as in the case of a deed. It does not revest the estate

30. *Hollingsworth v. Holbrook*, 80 Ia. 151, 20 Am. St. Rep. 411.

31. *Linker v. Long*, 64 N. C. 296; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Stanley v. Epperson*, 45 Tex. 644; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Sharpe v. Orme*, 61 Ala. 263; *North v. Henneberry*, 44 Wis. 306.

32. *Woods v. Hilderbrand*, *supra*; *North v. Henneberry*, *supra*.

33. *Respass v. Jones*, 102 N. C. 5.

in the mortgagor.³⁴ It is said, however, that it is as much a release as cancelling a bond. While the English rule has been recognized in this country,³⁵ in most of the jurisdictions of this country a real estate mortgage, altho in form a transfer of title, is regarded as merely a security for the payment of money; and in these jurisdictions the question of an alteration of the mortgage by the mortgagee affecting the title to the land does not arise.³⁶ In a few states where the mortgagee is regarded as the holder of the legal title to the land a material alteration of the mortgage by him avoids the instrument and re-vests the title in the mortgagor.³⁷

§ 21. Effect of material alteration of a mortgage note.—The effect of a material alteration of a mortgage note by the payee depends upon the circumstances of the particular case. If the giving of the note extinguishes the original debt the alteration of it by the mortgagee, whether fraudulent or not, discharges the mortgage.³⁸ If the giving of the note does not extinguish the original debt, and the alteration of the note is not fraudulent, the mortgage is not discharged;³⁹

34. *Harris v. Owen*, West's Ch. Rep. 527.

35. *Kendall v. Kendall*, *supra*.

36. *Russell v. Reed*, 36 Minn. 376.

37. *McIntyre v. Velte*, 153 Pa. St. 350.

38. *Tate v. Fletcher*, 77 Ind. 102.

39. *Cheek v. Nall*, 112 N. C. 370; *Elliott v. Blair*, 47 Ill. 342; *Clough v. Seay*, 49 Ia. 111.

but if the alteration is fraudulent the mortgage is discharged.⁴⁰

§ 22. When recovery may be had on original consideration.—The right to recover on the original consideration, where the obligee makes a material alteration of the document, usually depends upon whether it was done innocently or fraudulently. If done innocently the obligee may recover; but if done fraudulently he may not.⁴¹ Of course, where a promissory note is given in absolute payment of the indebtedness the original consideration is extinguished.

§ 23. Admissibility of an altered document in evidence.—Upon the question of the admissibility in evidence of altered documents the decisions are not harmonious. They have been held admissible against a party on trial for a criminal offense, and also to prove fraud.⁴² They also have been held admissible to prove collateral facts.⁴³ Some courts have held that an altered deed is admissible in evidence to prove the grantee's title;⁴⁴ while other courts have held the

40. Cases cited in foot-note 70.

41. *Green v. Sneed*, 101 Ala. 205; *Bigelow v. Stilphen*, 35 Vt. 521; *Whitmer v. Frye*, 10 Mo. 348.

42. *Low v. Merrill*, 1 Pin. (Wis.) 340. See also, *Chitty on Bills*, 191.

43. *Parker v. Moore*, 29 Mo. 218; *Hutchins v. Scott*, 2 M. & W. 809.

44. *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Alabama State Land Co. v. Thompson*, 104 Ala. 570; *Doe v. Hirst*, 3 Stark. 60, 14 E. C. L. 162.

contrary.⁴⁵ Altered receipts have been held inadmissible.⁴⁶ Also bills of sale.⁴⁷ Where the altered document has been offered in evidence in an action on the original consideration some courts have held it admissible,⁴⁸ while other courts have held the contrary.⁴⁹

§ 24. **Right to recover money paid upon an altered document.**—As previously stated, where the alteration is fraudulent the whole transaction is vitiated; and no recovery can be had even on the original consideration. Where the alteration is fraudulent it reaches not only the instrument, but the original consideration as well, and prevents recovery upon either.⁵⁰ If the party guilty of the fraud may found a claim upon the original consideration, the rule itself would be defeated. To allow parties to take the chances of success in fraudulently dealing with the written obligations of those with whom they contract without risk of loss in case of detection, would be an encouragement to this kind of

45. *Batchelder v. White*, 80 Va. 103; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165. See also, *Miller v. Lucio*, 80 Cal. 257.

46. *Elgin v. Hall*, 82 Va. 680; *Goodfellow v. Inslee*, 12 N. J. Eq. 355.

47. *Babb v. Clemson*, 10 S. & R. (Pa.) 419, 13 Am. Dec. 684.

48. *Sutton v. Toomer*, 7 B. & C. 416, 14 E. C. L. 66.

49. *Low v. Merrill*, *supra*; *Courcamp v. Weber*, 39 Neb. 533; *Morrison v. Huggins*, 53 Ia. 76.

50. *Armstrong v. Penn*, 105 Ga. 229, 31 S. E. R. 158; *Warder, etc., Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. R. 300.

fraud.⁵¹ Where, however, the alteration is not fraudulent the reason for the rule stated above does not exist; and a recovery may be had on the original consideration.⁵²

As regards the right to recover the money paid upon the altered instrument, the rule is that it may be recovered as in a case where it is paid under a mistake of fact.⁵³ Even where the party in paying the money was guilty of negligence he may recover, provided it would not be inequitable to the other party owing to a change in his position due to the payment of the money.⁵⁴ There are, however, two important exceptions to the foregoing rule. One is that a bank paying a bill of its own, in ignorance of the fact that its amount has been raised, cannot recover the amount so paid from a *bona fide* holder.⁵⁵ And the other is that a drawer is bound to know his drawer's signature, and cannot recover from a *bona fide* holder money paid in ignorance of the

51. *Meyer v. Huneke*, 53 N. Y. 412; notes, Am. St. Rep. 122.

52. *Green v. Sneed*, 101 Ala. 205, 46 Am. St. Rep. 119, 13 So. R. 277; *Miller v. Stark*, 148 Pa. St. 164, 23 Atl. R. 1058; *Kelly v. Trumble*, 74 Ill. 428; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. R. 46.

53. *Cheek v. Nall*, 112 N. C. 370, 17 S. E. R. 80; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Clough v. Seay*, 49 Ia. 111; *Heath v. Blake*, 28 S. C. 406, 5 S. E. R. 842.

54. *Nat. Bank of Commerce v. Nat. Banking Assn.*, 55 N. Y. 211, 14 Am. Rep. 232.

55. *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 393; *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310. *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190. See also notes, 86 Am. St. Rep. 123.

fact that the drawer's signature was forged.⁵⁶ It is to be observed, however, that the latter exception applies only where the drawer's *signature* has been forged, and not to cases where the forgery is in the body of the instrument. This is owing to the fact that the drawee is under no obligation to know the handwriting in the body of the instrument. In such cases the latter of the two exceptions stated has no application, and the money paid may be recovered.

§ 25. **Effect of ratification of alteration.**—Altho there may be doubt as to the ratification of a forgery in some cases, the courts hold that an alteration of a document, altho amounting to a forgery, can be ratified.⁵⁷ And where this is done the effect is the same as in the case of a prior authorization.⁵⁸ What constitutes a ratification is governed by the rules of agency. It is essential that the act be done with a knowledge of all the facts.⁵⁹ But even with knowledge of all

56. Nat. City Bank of Brooklyn v. Westcott, 118 N. Y. 468, 16 Am. St. Rep. 771, 23 N. E. R. 900; Parke v. Rosser, 67 Ind. 500, 33 Am. Rep. 102; Redington v. Woods, *supra*; Third Nat. Bank of St. Louis v. Allen, 59 Mo. 310. See also notes, 17 Am. St. Rep. 884; 86 Am. St. Rep. 124.

57. Wilson v. Hayes, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. R. 467.

58. Dickson v. Bamberger, 107 Ala. 293, 18 So. R. 290; Hagler v. State, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. R. 692; Booth v. Powers, 56 N. Y. 22; Bell v. Mahin, 69 Ia. 408, 29 N. W. R. 331.

59. Perkins v. Windmill, etc., Co. v. Tillman, 55 Neb. 652, 75 N. W. R. 1098; Benedict v. Miner, 58 Ill. 19; Cutler v. Rose, 35 Ia. 456.

the facts a mere failure to object is not sufficient to amount to a ratification.⁶⁰ On the other hand, suing on the instrument;⁶¹ agreeing to pay the amount of the instrument;⁶² receiving indemnity from the principal debtor,⁶³ etc., with knowledge of the alteration, constitute in each case a sufficient ratification.

§ 26. **Presumptions and burden of proof.**—As regards presumptions the decisions are in hopeless conflict. There are at least six more or less distinct views upon the subject. These six views, as stated in “Hughes on Evidence,”⁶⁴ are as follows: “(1) a presumption exists that the alteration was made contemporaneously with, or before, the execution of the instrument; (2) a presumption exists that it was made after the execution of the instrument; (3) no presumption exists in any case as to the time when it was made; (4) no presumption exists as to the time when it was made if no suspicious circumstances are apparent on the face of the instrument, but where there are suspicious circumstances connected with it there is a presumption that it was made after the execution of the instrument; (5) as a general rule, it is presumed to have been made contemporaneously with the execution of

60. *German Bank v. Dunn*, 62 Mo. 79.

61. *Perkins v. Windmill, etc., Co. v. Tillman*, *supra*.

62. *Prouty v. Wilson*, 123 Mass. 297; *Montgomery v. Cross-thwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 So. R. 498.

63. *Hagler v. State*, *supra*.

64. P. 214.

the instrument, but if any ground of suspicion is apparent upon the face of the instrument the law presumes nothing; (6) the presumption, if any, which arises, depends upon the character of the instrument."⁶⁵ And, as stated in "Hughes on Evidence," "The first of these views is based largely on the presumption of innocence, and is recognized in numerous decisions."⁶⁶ The second view is supported by comparatively few decisions, and it has been severely criticised. It still obtains, however, in a few jurisdictions, and seems to be confined for the most part to negotiable instruments.⁶⁷ The third view is supported by many decisions⁶⁸ and is characterized, by at least one recent author,⁶⁹ as the better view. The fourth view is supported by decisions of several leading courts.⁷⁰ The fifth view, according to

65. For an excellent discussion of this subject, and citations, see note, 86 Am. St. Rep. 128.

66. *Hunt v. Gray*, 35 N. J. L. 27; *Hagan v. Merchants' Ins. Co.*, 81 Ia. 321, 25 Am. St. Rep. 493; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82; *Brand v. Johnrowe*, 60 Mich. 210.

67. *Gettysburg Nat. Bank v. Chisholm*, 169 Pa. St. 565, 32 Atl. R. 730; *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499.

68. *Merritt v. Boyden*, 191 Ill. 136, 60 N. E. R. 907; *Ward v. Cheney*, 117 Ala. 238, 22 So. R. 996; *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324; *Wilson v. Haynes*, 40 531, 42 N. W. R. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196; *Martin v. Tuttle*, 80 Me. 207, 14 Atl. R. 207.

69. 2 Elliott on Evid., § 1505.

70. *Smith v. United States*, 69 U. S. 219; *Powell v. Panks*, 146 Mo. 620; *Alabama etc., Land Co. v. Thompson*, 104

Reynolds, is the American rule.⁷¹ While the sixth view is supported by Stephen, Taylor and Greenleaf,⁷² as well as by many decisions."⁷³ Thayer says, "As regards the proof of alterations in documents the cases are full of confusion. Fragments of substantive law embrace the rules of evidence relating to this subject; and it is further intolerably perplexed by a quantity of jargon about presumptions and the burden of proof which often conceals the lack of any clear apprehension of the subject on the part of those who use it, and often disguises the true character of sound decisions."⁷⁴ And Mr. Freeman, editor of "American State Reports," says, "Where the alteration is apparent the authorities are hopelessly divided as to the presumptions arising from such apparent alteration. Any attempt to reconcile them would be useless, and an accurate classification of their varying views is impossible. They seem to fall, however, into four general classes, each of which is representative of a view opposed to that of the others: 1. One line of cases holds that no presumption arises from an alteration apparent on the face of the instrument, but that the entire question of the time when the

Ala. 570, 53 Am. St. Rep. 80; *Collins v. Ball*, 82 Tex. 259, 27 Am. St. Rep. 877; *Bradley v. Dells Lumber Co.*, 105 Wis. 245.

71. Reynolds' Steph. Evid., art. 89.

72. Greenleaf Evid., §564.

73. *Bailey v. Taylor*, 11 Conn. 531, 541; *Boothby v. Stanley*, 34 Me. 515, 516.

74. Thayer's Prelim. Treat. on Evid. 527.

alteration was made is for the jury to consider in the light of all the evidence, intrinsic and extrinsic; 2. Another holds that an alteration apparent on the face of the paper raises a presumption that it was made after execution and delivery; 3. A third line of authorities holds that the presumption that the alteration was made after execution arises only where the alteration or the facts surrounding it are suspicious; and finally it is held by another group of courts: 4. That an alteration, apparent on the face of the paper is, without explanation, presumed to have been made before delivery."⁷⁵ Cases supporting these various views are cited below.⁷⁶

75. Notes, 86 Am. St. Rep. 129.

76. Class 1: *Merritt v. Boydon*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. R. 907; *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259; *Neff v. Horner*, 63 Pa. St. 327, 3 Am. Rep. 555; *Shepard v. Whetstone*, 51 Ia. 457, 33 Am. Rep. 143, 1 N. W. R. 753; *Robinson v. State*, 60 Ind. 26; *Coles v. Hills*, 44 N. H. 227.

Class 2: *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Wilson v. Henderson*, 17 Miss. 375, 48 Am. Dec. 716.

Class 3: *Alabama, etc., Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 So. R. 440; *Kelley v. Thuey*, 143 Mo. 422, 45 S. W. R. 300; *Collins v. Ball*, 82 Tex. 259, 27 Am. St. Rep. 877, 17 S. W. R. 614; *Bradley v. Dells Lumber Co.*, 105 Wis. 245, 81 N. W. R. 394; *Smith v. United States*, 69 U. S. 219; *Cox v. Palmer*, 1 McCrary, 431, 3 Fed. R. 16 (The doctrine is well expressed in this case.).

Class 4: *Orlando v. Gooding*, 34 Fla. 244, 15 So. R. 770; *First Nat. Bank v. Franklin*, 20 Kan. 264; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. R. 467; *Newman v. King*, 54 Ohio St. 273, 56 Am. St. Rep.

When it is shown that an alteration subsequent to the execution of the instrument has been made, a presumption arises that it was made by the holder, or by a party in privity with him, and not by a stranger to the instrument. Especially is this so where the instrument has been in the custody of the holder since its execution.⁷⁷

Where an alleged alteration is not apparent upon the face of the document the courts are agreed that the burden of proof is upon the party who alleges the alteration.⁷⁸

§ 27. **Same. Rule as to wills.**—Perhaps, as a general rule, an unattested alteration in a will which is complete without it, even where there is no suspicious circumstance, is presumed to have been made after the execution of the will.⁷⁹ It has been held, however, that where the alteration is entirely unexplained, and there is no circumstance which casts a suspicion upon it, there

705, 43 N. E. R. 683; *Richardson v. Fellner*, 9 Okla. 513, 60 Pac. R. 270.

77. *National Ulster Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. R. 408; *Winter v. Pool*, 100 Ala. 503, 14 So. R. 411; *Maguire v. Erchmeier*, 109 Ia. 301, 80 N. W. R. 395; *Eckert v. Louis*, 84 Ind. 99.

78. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. Rep. 99; *McClintock v. State Bank*, 52 Neb. 130, 71 N. W. R. 978; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201; *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 So. R. 498.

79. *Toebbe v. Williams*, 80 Ky. 661; *Crossman v. Crossman*, 95 N. Y. 145; *Doe v. Palmer*, 16 Q. B. D. 747, 15 Jur. 836.

is no presumption as to when it was made; but that the onus is upon the party who seeks to derive an advantage from it to show that it was made before the will was executed.⁸⁰ Where the will would be incomplete without the alteration, there is, as a general rule, a presumption that the alteration was made before the execution of the instrument.⁸¹ "Where a will has been drawn with blanks left for the names of legatees and the amounts of the legacies, which blanks are afterwards filled up, but there is no evidence to show when, the presumption is that the blanks were filled in before execution, and altho there may have been no blanks but the names of the legatees are found interlined, yet if the interlineation only supplies a blank in the sense, and appears to have been written with the same ink and at the same time as the rest of the will, the court will conclude that it was written before execution."⁸² But where a will is offered for probate the person offering the instrument should be prepared to show that the alteration was properly made, and explain all suspicious circumstances.⁸³ "Whoever propounds an instrument which, on the very face of it, exhibits grounds of great

80. *Crossman v. Crossman*, *supra*; In the Goods of Cadge, L. R. 1 P. & D. 543.

81. In the matter of Voorhees, 6 Dem. (N. Y.) 162; In the Goods of Cadge, *supra*.

82. 1 Jar. on Wills 144.

83. *In re Wilson*, 8 Wis. 171.

doubt, must remove those grounds and clean up the doubts."⁸⁴

§28. **Same. Alterations in pencil.**—As a general rule, alterations in pencil in a will, where the will is written in ink, are presumed deliberative and not final; whereas those made in ink are presumed final.⁸⁵ It has been held, however, that those made in lead pencil have the same effect as those made in ink.⁸⁶ In the case of alterations in both ink and pencil the presumption as to each, as stated above, is even stronger. As stated by Sir J. Nicol, "There are various erasures, and crossings, and interlineations—some in pencil, some in ink; the general presumption and probability are that, where alterations in pencil only are made, they are deliberative; where in ink they are final and absolute; but when they are of both sorts the presumption as to each is stronger; if the writer had made up his mind, and intended the variation to be final, he would, instead of pencil, have used other material, ink; if he were deliberating only, and undecided, he would not use ink, but pencil."⁸⁷

§ 29. **Province of court and jury.**—As regards the question of what constitutes matter for the

84. *Cooper v. Bockett*, 4 Moo. P. C. C. 419, 4 Not. Cas. 685, 10 Jur. 931, 4 Marit & E. C. C. L. Cas. 685 (the leading English case).

85. *Gann v. Gregory*, 3 De G. M. & G. 780; *Mence v. Mence*, 18 Ves. Jr. 348; *In the Goods of Hall*, L. R. 2 P. & D. 367.

86. *Tomlinson's Est.*, 133 Pa. St. 249, 19 Am. St. Rep. 637; *Knox's Est.*, 131 Pa. St. 220, 17 Am. St. Rep. 798.

87. *Hawkes v. Hawkes*, 1 Hagg. 322.

court to decide, and what matter of fact for the jury, the decisions are harmonious. Whether an alleged alteration is material or immaterial is a question for the court to decide.⁸⁸ This is owing to the fact that the question involves the effect upon the legal rights of the parties. And in jurisdictions where the courts recognize certain presumptions in the case of alterations apparent on the face of the instrument, it is for the court to decide whether an alleged alteration is apparent or not.⁸⁹ On the other hand, when the question is whether an alteration exists or not, it is one for the jury to decide.⁹⁰ And where the jury find that an alteration exists, it is also a question for them to decide by whom it was made;⁹¹ and if made by the obligee, or by his authority, whether the obligor gave consent.⁹²

88. *Johnson v. Moore*, 33 Kan. 90, 5 Pac. R. 406; *Brown v. Johnson*, 127 Ala. 292, 85 Am. St. Rep. 134, 28 So. 579; *Keene v. Monroe*, 75 Va. 424; *Milliken v. Marlin*, 66 Ill. 13; *Wood v. Steele*, 6 Wall. (U. S.) 80.

89. *Ives v. Farmers' Bank*, 2 Allen (Mass.) 236.

90. *Hunt v. Gray*, 35 N. J. L. 175, 11 Am. Dec. 546; *Schwarz v. Herrenkind*, 26 Ill. 208.

91. *Martin v. Kline*, 157 Pa. St. 473, 27 Atl. R. 753; *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. R. 467; *Milliken v. Marlin*, *supra*.

92. *White v. Haas*, 32 Ala. 430, 70 Am. Dec. 548; *Benedict v. Miner*, 58 Ill. 19.

CHAPTER III.

The Best Evidence Rule.

§ 1. **The rule.** The best evidence rule requires that the highest degree or grade of testimony attainable, of which the particular case is susceptible, be produced.¹ This does not necessarily imply, however, that the strongest or weightiest testimony attainable must be produced.² The rule has to do with the *grade* of the testimony rather than its *weight*.³ It is conceivable that testimony of like grade may be of different weight. The mere fact that other primary testimony is stronger and more nearly conclusive than the primary testimony offered is no reason for excluding the latter. On the other hand, *secondary* testimony may not be substituted for primary or original testimony where the latter is attainable. The rule excludes testimony which indicates or presupposes that the party who offers it can produce a higher grade of testimony. Where secondary evidence is not

1. *Com. v. Pendergast*, 138 Pa. St. 633; *Mcduff v. Detroit Eve. Journal*, 84 Mich. 1; *Vigns v. O'Bannon*, 118 Ill. 334; *Wood's Succession* 30 La. Ann. 1002; *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. R. 105.
2. *Vigns v. O'Bannon*, *supra*; *Hewitt v. State*, 121 Ind. 245, 23 N. E. R. 83; *Crozier v. New Chester Water Co.*, 148 Pa. St. 130, 23 Atl. R. 1123; *Holmes v. Coryell*, 58 Tex. 680; *State v. Cain*, 9 W. Va. 559.
3. *Hewitt v. State*, *supra*; *Roberts v. Dover*, 72 N. H. 147, 55 Atl. R. 895; *Canfield v. Johnson*, 144 Pa. St. 61, 22 Atl. R. 974; *Com. v. Merrell*, 99 Mass. 542.

substituted for primary evidence the rule is not violated.⁴

§ 2. **Origin of the rule.**—The best evidence rule is of ancient origin. Originally it applied to all classes of testimony. At present, however, it is restricted to documentary evidence.

§ 3. **Importance of the rule.**—The best evidence rule is one of very great importance. Lord Chancellor Hardwicke, in speaking of it, says: "The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit."⁵ There are, however, many important rules of evidence.

§ 4. **Historical development of the rule.**—Professor Thayer, in discussing the historical development of the best evidence rule, says: "During the latter part of the seventeenth century and the whole of the eighteenth, while rules of evidence were forming, the judges and text-writers were in the habit of laying down two principles, namely: (1) that one must bring the best evidence that he can, and (2) that, if he does this, it is enough. These principles were beginnings in the endeavor to give consistency to the system of evidence before juries. They were never literally enforced; they were principles, and not

4. *Canfield v. Johnson*, *supra*; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Vigns v. O'Bannon*, *supra*; *Barnum v. Barnum*, 9 Conn. 242.

5. *Omychund v. Barker*, 1 Atk. 21, 49 Willes 538, 26 Eng. Reprint 15.

exact rules; but for a long time they afforded a valuable test. As rules of evidence and exceptions to the rules became more definite, the field for the application of the general principle of the best evidence rule was narrower. But it was often resorted to in a manner which was very misleading. . . . Always the chief example of the best evidence principle was the rule about proving the contents of a writing. But the origin of this rule about writings was older than the best evidence principle, and that principle may well have been generalization from this rule, which appears to be traceable to the doctrine of *profert*. That doctrine required the actual production of the instrument which was set up in pleading. In like manner it was said, in dealing with a jury that a jury could not specifically find the contents of a deed unless it had been exhibited to them in evidence. And afterwards when the jury came to hear testimony from witnesses it was said that witnesses could not undertake to speak to the contents of a deed without the production of the deed itself.”⁶

§ 5. Application of the rule in general.—As previously stated, it was formerly held that the best evidence rule applied to all classes of testimony, whereas at present it is restricted to documents. It is also to be observed that it is restricted to cases where the documents are tendered as *operative* instruments. In other words,

6. Note, Thayer's Cas. on Evid. (1st ed.) 726.

the rule is restricted to the *terms* of the document; and does not apply to *other facts* which may concern it. Thus, where the question in issue is the *contents* of a given promissory note the rule is applicable. But where the question in issue is the *sale* of the note the rule is not applicable. As said by Mills, J., "We cannot agree . . . that the production of the note was necessary. It could only be held necessary by not attending to the distinction between proving the existence and contents of a note and the sale of a note. Of the former, the note is the better evidence; but of the latter the note furnishes no evidence. . . . The existence of a note is as certainly perceived by the senses or acknowledged in conversation as that of any other article of commerce; and it might as well be urged that before acknowledgement of a sale of any other article could be given in evidence the article itself must be produced in court in order that the court might see that it really existed, as that a note should be produced."⁷ Where a material fact in issue is whether a given letter was posted or not, it is not essential to produce the letter.⁸ It is to be observed, however, that the courts, in applying the rule, are not harmonious. Thus, while some courts hold that the rule applies to questions of ownership,⁹ tenancy,¹⁰

7. *Lamb v. Moberly*, 3 Mon. (Ky.) 179.

8. *Hagedorn v. Reid*, 3 Camp. 377.

9. *Street v. Nelson*, 67 Ala. 504; *contra*, *Westfield Cigar Co.*

transfer of land,¹¹ and transfer of chattels,¹² other courts, as indicated in the foot-notes, hold the contrary.

To the following classes of cases the rule has been held to apply: where the question is, the contents of a verdict;¹³ the contents of a judgment;¹⁴ whether a certain person has been convicted of a crime;¹⁵ the proceedings of a school board;¹⁶ whether a certain person has been imprisoned in the penitentiary;¹⁷ a sale of land by order of the court;¹⁸ the existence of a divorce,¹⁹ a warrant,²⁰ an execution,²¹ or a writ;²² the discontinuance of a suit;²³ enlistment in the army

v. Ins. Co., 169 Mass. 382; Kirkpatrick v. Clark, 132 Ill. 342.

10. Taylor v. Peck, 21 Grat. (Va.) 11; *contra*, Gilbert v. Kennedy, 22 Mich. 5, 18.
11. Showman v. Lee, 86 Mich. 556; *contra*, Primrose v. Browning, 56 Ga. 369.
12. Sirrine v. Briggs, 31 Mich. 443; *contra*, Price v. Wolfer, 33 Oreg. 15, 52 Pac. R. 759.
13. Abrams v. Smith, 3 Blackf. (Ind.) 95.
14. Northrop v. Chase, 76 Conn. 146, 36 Atl. R. 518.
15. People v. Reinhart, 39 Cal. 449; State v. Edwards, 19 Mo. 674.
16. Whitehead v. School District, 145 Pa. St. 418; Kane v. School District, 48 Mo. App. 408.
17. State v. Lewis, 80 Mo. 110.
18. Phillips v. Costley, 40 Ala. 486.
19. State v. Thompson, 19 Ia. 299; Tice v. Reeves, 30 N. J. L. 314.
20. Ross v. Pleasants, 3 Pa. St. 408.
21. Perry v. Whipple, 38 Vt. 278.
22. Brush v. Taggart, 7 Johns. (N. Y.) 19.
23. Sheldon v. Frink, 12 Pick. (Mass.) 568.

or navy;²⁴ desertion of a soldier;²⁵ a sale of public land;²⁶ proceedings of a corporation as contained in the records;²⁷ subscriptions for stock;²⁸ how a person voted;²⁹ granting of a pardon;³⁰ the contents of public records and books, the heading of a hotel register;³¹ the fixed grade of a street;³² a tax title acquired by purchase under an execution;³³ the fact that a public street has been vacated;³⁴ any instrument which the law requires to be in writing;³⁵ any contract which has been reduced to writing;³⁶ any writing whose existence or contents are in dispute and which are material to the issue or to the credit of a witness;³⁷ assignment of a lease;³⁸ assignment of a

24. *Atwood v. Winterport*, 60 Me. 250.

25. *Terrell v. Colebrook*, 35 Conn. 188.

26. *Chicago v. McGraw*, 75 Ill. 566.

27. *Perryman v. Greenville*, 51 Ala. 507; *Pittsburg Ry. Co. v. Clarke*, 29 Pa. St. 146.

28. *Taussig v. Glenn*, 51 Fed. R. 409.

29. *Lane v. Bailey*, 29 Mont. 549, 75 Pac. R. 191.

30. *Bartlett v. Patton*, 33 W. Va. 71.

31. *Granley v. Jermyn*, 163 Pa. St. 501.

32. *Livingston v. Hudson*, 85 Ga. 835; *Farrar v. Fesenden*, 39 N. H. 268.

33. *Whitney v. Thomas*, 23 N. Y. 281; *Shiver v. Bentley*, 78 Ga. 537; *McKee v. McKee*, 16 Md. 516.

34. *Lathrop v. Central Ia. Ry. Co.*, 69 Ia. 105.

35. *Cox v. Ward*, 107 N. C. 507; *Fitzgerald v. Adams*, 9 Ga. 471.

36. 1 *Greenleaf Evid.*, § 85.

37. *Belcher v. Farren*, 89 Cal. 73; *Thayer v. Boyd*, 31 Neb. 382.

38. *Landt v. McCullough*, 206 Ill. 214, 69 N. E. R. 107.

note;³⁹ assignment of an account;⁴⁰ contents of a bond;⁴¹ assignment of a judgment;⁴² contents of a letter;⁴³ contents of a telegram;⁴⁴ contents of account books;⁴⁵ contents of a bill of lading;⁴⁶ written or printed rules, regulations or orders of a railroad company as to the duties of the employees, or as to the management and running of its trains;⁴⁷ contents of an application for a life-insurance policy;⁴⁸ contents of standard mortality tables;⁴⁹ contents of time-checks to em-

39. *Stancill v. Spain*, 133 N. C. 76, 45 S. E. R. 466.

40. *Bruce v. Strawn Coal-Min. Co.*, (Tex.), 59 S. W. R. 52.

41. *Georgia Pac. Ry. Co. v. Strickland*, 80 Ga. 776, 12 Am. St. Rep. 282, 6 S. E. R. 27; *Walker v. Armstrong*, 2 Kan. 198.

42. *Hawkins v. Rice*, 40 Ia. 435; *Lockhart v. Jones*, 9 Rob. (La.) 381.

43. *Prüssing v. Jackson*, 208 Ill. 85, 69 N. E. R. 771; *Post v. Leland*, 184 Mass. 601, 69 N. E. R. 361; *Stern v. Stanton*, 184 Pa. St. 468, 39 Atl. R. 404; *Rumbough v. So. Imp. Co.*, 112 N. C. 751, 17 S. E. R. 536, 34 Am. St. Rep. 528.

44. *Magie v. Herman*, 50 Minn. 424, 52 N. W. R. 909, 36 Am. St. Rep. 660; *McCormick v. Joseph*, 83 Ala. 401, 3 So. R. 796; *Anheuser-Busch Assoc. v. Hutmacher*, 127 Ill. 652.

45. *Bartlet v. Wheeler*, 195 Ill. 445, 63 N. E. R. 169; *Roden v. Brown*, 103 Ala. 324, 15 So. R. 598; *Wilson v. Morse*, 117 Ia. 581, 91 N. W. R. 823; *Brayton v. Sherman*, 119 N. Y. 623, 23 N. E. R. 471.

46. *Columbus, etc., Ry. Co. v. Tillman*, 79 Ga. 607, 5 S. E. R. 135; *Mather v. Goddard*, 7 Conn. 304.

47. *St. Louis, etc., Ry. Co. v. Bauer*, 156 Ill. 106, 40 N. E. R. 448; *Louisville, etc., Ry. Co. v. Orr*, 94 Ala. 602, 10 So. 167.

48. *Lewis v. Hudman*, 56 Ala. 186.

49. *Erb v. Popritz*, 59 Kan. 264, 52 Pac. R. 871, 68 Am. St. Rep. 362.

ployees of a railroad company;⁵⁰ printed instructions in an illustrated catalog concerning the management of an engine;⁵¹ a discharge in bankruptcy;⁵² probate of a will;⁵³ rating of a person in the books of a commercial agency;⁵⁴ the existence and amount of a legacy;⁵⁵ the existence and description of a devise;⁵⁶ the appointment of an executor;⁵⁷ the fact that certain property of the testator was not disposed of by his will;⁵⁸ the terms of a wager reduced to writing;⁵⁹ physician's report of a physical examination made by him;⁶⁰ contents of a newspaper article;⁶¹ contents of an invoice of goods;⁶² contents of the inventory of a decedent's estate;⁶³ contents of

50. *Chicago, etc., Ry. Co. v. Brown*, 44 Kan. 384, 24 Pac. R. 497.

51. *Richardson v. Douglas*, 100 Ia. 239, 69 N. W. R. 530.

52. *Regan v. Regan*, 72 N. C. 195.

53. *Graham v. Whitely*, 26 N. J. L. 254; *Jones v. Goodrich*, 5 Moody, P. C. 16.

54. *Deere v. Bagley*, 80 Ia. 197, 45 N. W. R. 557.

55. *Miller v. Catlet*, 10 Gratt. (Va.) 477.

56. *Frontz v. Wood*, 1 Hill (S. C.) 165.

57. *Miller v. Catlet*, *supra*.

58. *Morrill v. Otis*, 12 N. H. 466.

59. *Frazee v. State*, 58 Ind. 8.

60. *Taylor v. Mod. Wood. of Amer.*, 42 Wash. 304, 84 Pac. R. 867.

61. *Bond v. Central Bank*, 2 Ga. 92.

62. *Coder v. Statts*, 51 Kan. 382.

63. *McCown v. Terral*, 40 S. W. R. 54 (Tex.).

deeds,⁶⁴ real estate mortgages,⁶⁵ chattel mortgages⁶⁶ and leases.⁶⁷

On the other hand, it has been held that the rule does not apply to the following classes of cases: the receipt of goods by a common carrier;⁶⁸ the appointment of an agent;⁶⁹ the receipt of a telegram;⁷⁰ payment of a judgment;⁷¹ payment of a tax;⁷² label ("rye whiskey") on a jug;⁷³ shipping marks on barrelheads;⁷⁴ date of birth;⁷⁵ attendance of jurors and witnesses at court;⁷⁶ inscription on boxes of a passenger killed while traveling on a train;⁷⁷ the value of

64. *Ebersole v. Rankin*, 102 Mo. 488; *Collar v. Collar*, 86 Mich. 507; *Georgia Pac. Ry. Co. v. Strickland*, 80 Ga. 776, 12 Am. St. Rep. 282 and note.

65. *Soloman v. Creech*, 82 Ga. 445.

66. *Curtis v. Wilcox*, 91 Mich. 229.

67. *Burks v. Bragg*, 89 Ala. 204.

68. *Louisville, etc., Ry. Co. v. McGuire*, 79 Ala. 395.

69. *Whitfield v. Brand*, 16 M. & W. 282.

70. *Connor v. State*, 23 Tex. App. 378; *Western Union Tel. Co. v. Cline*, 8 Ind. App. 364.

71. *Planters' Bank v. Borland*, 5 Ala. 531.

72. *Davis v. Hare*, 32 Ark. 386.

73. *Com. v. Blood*, 11 Gray (Mass.) 74, 77.

74. *United States v. DeGraff*, 14 Blatch. 381, 385.

75. *Morrison v. Emsley*, 53 Mich. 564; *State v. Woods*, 49 Kan. 237; *Com. v. Dill*, 156 Mass. 226; *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 743, and note.

76. *Massey v. Westcott*, 40 Ill. 160; *Baker v. Brill*, 15 Johns. (N. Y.) 260.

77. *Kansas Pac. Ry. Co. v. Miller*, 20 Colo. 442, 451, 462 ("if a sign were painted on a house, it would hardly be contended that the house would have to be produced, nor can it be said that the law converts the court room into

goods;⁷⁸ words on a tag attached to a valise;⁷⁹ inscription on a banner;⁸⁰ time when given trains are due;⁸¹ that a given person's name was not stated in a will;⁸² the date when a ship left port, the course she took, and the date of arrival at her destination;⁸³ mere possession of real property;⁸⁴ ownership of real property where the title is involved only collaterally;⁸⁵ transfer of possession of land;⁸⁶ use of certain lands for depot grounds;⁸⁷ date when a writ was issued;⁸⁸ the fact that a given suit has been tried;⁸⁹ that certain personal property was listed for the pur-

a receptacle for wagons, boxes, tombstones, and the like, on which one's name may be written.").

78. Savannah Ry. Co. v. Hoffmayer, 75 Ga. 410.

79. Com. v. Morrell, 99 Mass. 542.

80. Rex v. Hunt, 3 B. & Ald. 566, 22 Rev. Rep. 485, 5 E. C. L. 327 (prosecution for unlawful assembly; and the purpose of the testimony was to show the character and intention of the defendants.).

81. Chicago Ry. Co. v. George, 19 Ill. 510, 71 Am. Dec. 239.

82. Bulger v. Ross, 98 Ala. 267.

83. United States v. Gilbert, 25 Fed. Cac. No. 15, 204, 2 Sumn: 19.

84. Jacob Tome Institute v. Davis, 87 Md. 591, 41 Atl. R. 166; Deu v. Hamilton, 12 N. J. L. 109.

85. Central Ry. Co. v. Whitehead, 74 Ga. 441; Alabama Gt. So. Ry. Co. v. Johnston, 128 Ala. 283, 29 So. R. 771.

86. Jacob Tome Institute v. Davis, *supra*; Martin v. Bowie, 37 S. C. 102, 15 S. E. R. 736.

87. Fowler v. Farmers' Loan Co., 21 Wis. 77.

88. Deu v. Hamilton, 12 N. J. L. 109.

89. Johnston v. Hamburger, 13 Wis. 195.

pose of taxation;⁹⁰ the receipt of rent;⁹¹ tenancy and occupancy;⁹² the fact that notices of a sale were posted;⁹³ contents of a deed which comes into the case only collaterally;⁹⁴ identity of a person, thing, or document;⁹⁵ the fact that articles of incorporation were filed;⁹⁶ the fact that directors of a corporation were elected;⁹⁷ conversion of a document;⁹⁸ publication of a notice;⁹⁹ publication of an ordinance.¹⁰⁰

§ 6. Application of the rule to chattels.—As regards the application of the rule to material objects other than paper the decisions are not harmonious. Lord Kenyon applied it to a bushel

90. *Hewitt v. State*, 121 Ind. 245.

91. *Wilcox v. Bates*, 58 Wis. 128.

92. *Central Ry. Co. v. Whitehead*, *supra*; *Rayner v. Lee*, 20 Mich. 384.

93. *McMillan v. Baxley*, 112 N. C. 578; *Lavaretta v. Halcombe*, 18 Ala. 503.

94. *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; *Palmer v. Tripp*, 8 Cal. 95.

95. *Logan v. Gray*, Tapp (Ohio) 69 (persons alleged to have been married); *Hadley v. Citizens' Sav. Bank*, 123 Mass. 301 (piece of land); *Lewis v. Healey*, 73 Conn. 744, 48 Atl. R. 212 (check); *Goddard v. Sawyer*, 91 Mass. 78 (promissory note); *Citizens' Bank v. Rhutasel*, 67 Ia. 316, 25 N. W. R. 261 (chattels covered by mortgage); *Ames v. First Div. St. Paul, etc., Ry. Co.*, 12 Minn. 412 (lumber referred to in bill of sale).

96. *Johnson v. Crawfordsville Ry. Co.*, 11 Ind. 280.

97. *Partridge v. Badger*, 25 Barb. (N. Y.) 146.

98. *Bucher v. Jaratt*, 3 B. & B. 143 (leading case).

99. *Lingle v. Chicago*, 172 Ill. 170.

100. *Teft v. Size*, 10 Ill. 432.

measure.¹ And later it was applied to a dog.² According to the modern rule, however, it is confined to writings. But there is still a want of harmony as regards the application of the rule to inscriptions on material objects other than paper or parchment. It has been held to apply to an inscription on a coffin plate,³ and to an inscription on a ring;⁴ while, on the other hand, it has been held not to apply to an inscription on boxes,⁵ or to shipping marks on barrel heads.⁶ It also has been held to apply to the plan of a house,⁷ the wrapper of a butter package,⁸ the address on a hamper,⁹ and the post mark on an envelope;¹⁰ and not to apply to a label on a jug,¹¹ a superscription on an envelope,¹² an inscription on a tag attached to a traveling bag,¹³ and an inscription on a banner.¹⁴

Dean Wigmore says, "It is impossible to say that any settled doctrine has found favor respecting the application of the rule to material

1. *Chenie v. Watson*, Peake, Add. Cas. 123 (1797).
2. *Lewis v. Hartley*, 7 C. & P. 405 (1835).
3. *Reg. v. Edge*, cited on Wills on Circum. Evid. (5th ed.) 212.
4. *Reg. v. Farr*, 4 F. & F. 336.
5. *Kan. Pac. Ry. Co. v. Miller*, 2 Colo. 442, 451, 462.
6. *United States v. DeGraff*, 14 Blatch. 381, 385.
7. *Bryant v. Stilwell*, 24 Pa. St. 314, 317.
8. *Write v. State*, 88 Md. 436, 41 Atl. R. 495.
9. *Reg. v. Hinley*, 1 Cox Cr. Cas. 13.
10. *Rex v. Johnson*, 7 East, 65, 66.
11. *Com. v. Blood*, 11 Gray (Mass.) 74, 77.
12. *United States v. Babcock*, 3 Dillon, 571, 574.
13. *Com. Morrell*, 99 Mass. 542.
14. *King v. Hunt*, 3 B. & Ald. 566.

objects, not paper, bearing inscriptions in words. There are inherent difficulties. It is impracticable to base any distinction upon the material bearing the inscription, for a notice-board or a tombstone may deserve the application of the rule as well as a sheet of paper. Nor is it practicable to distinguish according to number of words; for each number is but one higher than the preceding, and a broker's note of ten words, or a baggage-check of a few initials may need inspection as much as a lengthy lease for ninety-nine years. Nor can the purpose of the words be material; for the memorandum-tick made for private verification may become as important as the deed intended for public registration. No court seems to have attempted, and certainly no court has achieved, a satisfactory test for the distinction drawn. There are precedents requiring and precedents not requiring production,—precedents often entirely irreconcilable if one were seeking an inflexible rule; the rational and practical solution is to allow the trial court in discretion to require production of an inscribed chattel wherever it seems highly desirable in order to ascertain accurately a material fact."¹⁵

§ 7. **Secondary evidence.**—Secondary evidence presupposes the existence at some time of primary or original evidence. And where the latter is attainable the former is inadmissible. Under certain circumstances, however, secondary evi-

15. Wigmore on Evid., Vol. II., § 1182.

dence is admissible. As stated in "Hughes on Evidence," it is admissible "(1) When the original is lost and a reasonable but unsuccessful search has been made for it.¹⁶ (2) When the original is in the hands of the adverse party and he fails to produce it after receiving reasonable notice to do so.¹⁷ (3) When the original is beyond the jurisdiction of the court.¹⁸ (4) When the nature of the original is such as to render it practically immovable.¹⁹ (5) When the original is in the hands of a stranger who is not legally bound to produce, and who, after being served with a *subpoena duces tecum*, or after being sworn and admitting that the original is in court, refuses to produce it.²⁰ (6) When the original consists of numerous documents which cannot be examined conveniently in court, and the general result of all of them is the fact sought to be proved, and that fact is ascertainable by calculation, and the witness who testifies to it is skilled in the examination of documents.²¹ (7) When the evidence offered is collateral to the fact in issue.²² (8) When the original is a public document.²³

16. Riggs v. Taylor, 9 Wheat. (U. S.) 483, 486; Rhode v. McLean, 101 Ill. 467; Clark v. Hornbeck, 17 N. J. Eq. 430; Chapin v. Taft, 18 Pick. (Mass.) 379.

17. Turner v. Yates, 16 How. (U. S.) 14, 26.

18. Burton v. Driggs, 20 Wall. (U. S.) 125; 134.

19. Northfield v. Warren, 16 Gray (Mass.) 171, 174.

20. Brandt v. Klein, 17 Johns. (N. Y.) 335.

21. Burton v. Driggs, *supra*.

22. Coonrod v. Madden, 126 Ind. 197.

(9) When the original has been recorded according to law, and a copy of the same, duly authenticated by the proper officer, is made admissible in evidence by statute."²⁴

§ 8. Preliminary proof of loss or destruction of original.—Before secondary evidence of the contents of an instrument, which is alleged to be lost or destroyed, is admissible, satisfactory proof must be given of the former existence, proper execution, and genuineness of the original;²⁵ and also of its loss or destruction.²⁶ And where the instrument is lost, satisfactory proof that a reasonable search for it has been made is essential; and furthermore, that the search was unsuccessful.²⁷ The burden of laying this foundation for the admission of secondary evidence rests upon the party who seeks to introduce it.²⁸ This

23. *Whitehouse v. Beckford*, 9 Foster, 471, 480. See also, Greenl. on Evid. §§ 91, 508.

24. *Patterson v. Winn*, 5 Pet. (U. S.) 233, 241.

25. *Ebersole v. Rankin*, 102 Mo. 488, 15 S. W. R. 422; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Edwards v. Noyes*, 65 N. Y. 125; *Burr v. Kase*, 168 Pa. St. 81, 31 Atl. R. 954; *Helton v. Asher*, 103 Ky. 730, 46 S. W. R. 22, 20 Ky. L. Rep. 935, 82 Am. St. Rep. 601.

26. *Helton v. Asher*, *supra*; *Oliver v. Persons*, 30 Ga. 391, 76 Am. Dec. 657; *Potts v. Coleman*, 86 Ala. 94, 5 So. R. 780.

27. *Burgess v. Blake*, 128 Ala. 105, 28 So. R. 963, 86 Am. St. Rep. 78; *Ebersole v. Rankin*, *supra*; *Dyer v. Fredericks*, 63 Me. 173; *Hawkins v. Rice*, 40 Ia. 435; *Post v. Leland*, 184 Mass. 601, 69 N. E. R. 361.

28. *Dyer v. Fredericks*, *supra*; *Emig v. Diehl*, 76 Pa. St. 359.

preliminary proof may be made by affidavit,²⁹ or by oral testimony in open court.³⁰ The *sufficiency* of this preliminary evidence is a matter which rests in the sound discretion of the trial court; but its *admissibility* depends upon the general rules of evidence applicable to other cases.³¹ These principles are also applicable in proving loss or destruction of public records.³² And while testimony of the custodian of the records is, of course, admissible,³³ proof of their loss or destruction may be given by any person who has knowledge of the fact.³⁴ Some courts hold that the certificate of the custodian of the record is competent to prove its loss or destruction,³⁵ while other courts hold the contrary.³⁶

The search for the lost instrument must be

29. *Almy v. Reed*, 10 Cush. (Mass.) 421; *Clark v. Marsh*, 20 Vt. 338.
30. *Gray v. Thomas*, 83 Tex. 246, 18 S. W. R. 721; *Bagley v. Eaton*, 10 Cal. 126.
31. *Clark v. Hornbeck*, 17 N. J. Eq. 430; *Apperson v. Ingram*, 12 Mo. 59; *Rhode v. McLean*, 101 Ill. 467.
32. *Cilley v. Van Patten*, 68 Mich. 80, 35 N. W. R. 831; *Read v. Station*, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740.
33. *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. R. 1002.
34. *Weis v. Tiernan*, 91 Ill. 27; *Johnson v. Skipworth*, 59 Tex. 473.
35. *Ruggles v. Gaily*, 2 Rawle (Pa.) 232.
36. *Wilcox v. Ray*, 2 N. C. 410; *Young v. Mackall*, 3 Md. 398.

bona fide and diligent;³⁷ and the proof must be sufficient to establish a reasonable inference that the instrument is lost.³⁸ A mere statement of counsel as to the search made by his client, based upon information received from the latter, is insufficient;³⁹ and a mere conclusion of the party offering the secondary evidence, that the original is lost or destroyed, is insufficient.⁴⁰ Moreover, the mere statement of a witness that diligent search has been made is insufficient.⁴¹

Ordinarily, proof of the loss or destruction of the instrument should be made by its custodian.⁴² In case of his death it should be made by his legal representative.⁴³ If he is out of the jurisdiction of the court his deposition should be obtained, or a reasonable excuse given for not doing so.⁴⁴ It has been held, however, that the tes-

37. *Hayden v. Mitchell*, 103 Ga. 431, 30 S. E. R. 287; *Prussing v. Jackson*, 208 Ill. 85, 69 N. E. R. 771; *Rullman v. Barr*, 54 Kan. 643, 39 Pac. R. 179; *Williams v. Williams*, 108 Ia. 91, 78 N. W. R. 792.

38. *Burt v. Long*, 106 Mich. 210, 64 N. W. R. 60; *Clark v. Hornbeck*, 17 N. J. Eq. 430.

39. *Smith v. Coker*, 110 Ga. 650, 36 S. E. R. 105.

40. *Avery v. Stewart*, 134 N. C. 287, 46 S. E. R. 519; *Booth v. Cook*, 20 Ill. 129; *Johnson v. Mathews*, 5 Kan. 118.

41. *Rankin v. Crow*, 19 Ill. 626.

42. *Prussing v. Jackson*, *supra*; *Lee v. Birmingham*, 30 Kan. 312; *Nelson v. Cent. Land Co.*, 35 Minn. 408, 29 N. W. R. 121.

43. *Vandergriff v. Piercy*, 59 Tex. 371; *Rankin v. Crow*, *supra*.

44. *Deaver v. Rice*, 24 N. C. 280; *Phillips v. U. S. Benev. Soc.* 120 Mich. 142, 79 N. W. R. 1, *Binney v. Russell*, 109 Mass. 55; *Kearney v. Mayor*, 92 N. C. 617.

timony of other persons, who have personal knowledge of the facts, may be sufficient.⁴⁵ The degree of diligence required depends upon the circumstances of the particular case, including the character and importance of the document.⁴⁶ The evidence should show that the search was made in good faith.⁴⁷ It should not arouse suspicion that the original is designedly suppressed.⁴⁸ If the paper is of very considerable importance greater diligence is required in searching for it than where it is of much less importance.⁴⁹ If it is of very little importance slight evidence is sufficient.⁵⁰ In the case of a public document, a reasonable search at the place where the law requires it to be deposited is usually sufficient.⁵¹

§ 9. Original in hands of adverse party.—

Where the instrument is in the hands of the adverse party due notice must be given him, or

45. *Laster v. Blackwell*, 128 Ala. 143, 30 So. R. 663; *Wagoner v. Alvord*, 81 Tex. 365, 16 S. W. R. 1083; *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. R. 797.

46. *Hayden v. Mitchell*, 103 Ga. 431, 30 S. E. R. 287; *Johnson v. Armwine*, 42 N. J. L. 451, 36 Am. Rep. 527.

47. *Prussing v. Jackson*, *supra*.

48. *Robards v. McLean*, 30 N. C. 522; *Clark v. Hornbeck*, 17 N. J. Eq. 430.

49. *Johnson v. Armwine*, *supra*; *Gillis v. Wilmington, etc., Ry. Co.*, 108 N. C. 441, 13 S. E. R. 11, 1019.

50. *Atchison, etc., Ry. Co. v. Palmore*, 68 Kan. 545, 75 Pac. R. 509, 64 L. R. A. 90; *Johnson v. Armwine*, *supra*.

51. *Woodruff v. State*, 61 Ark. 157, 32 S. W. R. 102; *Johnson v. Armwine*, *supra*.

his attorney, to produce it, to render secondary evidence of its contents admissible.⁵² What constitutes due notice depends upon the circumstances of the particular case. Where the adverse party has the instrument with him in court, a request made in court is sufficient.⁵³ It has been contended that the purpose of giving notice in this sort of case is to enable the party notified to procure evidence to explain or support the writing; and that for this reason a request made in court to produce it is not sufficient.⁵⁴ This contention, however, is erroneous. Greenleaf says, "the object of the notice is not only to procure the paper, but to give the party an opportunity to provide the proper testimony to support or impeach it."⁵⁵ The latter part of this reason is also erroneous; and it has been either repudiated or ignored both in England and in this country.⁵⁶ Merrick, C. J., says, "The reason of the rule is that possibly the instrument, when produced, will be less favorable to the plaintiff than parol proof which they may ob-

52. *Landt v. McCullough*, 206 Ill. 214, 69 N. E. R. 107; *Roberts v. Dixon*, 50 Kan. 436, 31 Pac. R. 1083; *Stoll v. Daly Min. Co.*, 19 Utah 271, 57 Pac. R. 295; *Payne v. Crawford*, 102 Ala. 387, 14 So. R. 854.

53. *Dwyer v. Collins*, 7 Exch. 639.

54. *Dwyer v. Collins*, *supra*.

55. 1 Greenl. on Evid., § 563, d.

56. *Dwyer v. Collins*, *supra*; *Hanselman v. Doyle*, 90 Mich. 142; *Ferguson v. Miles*, 8 Ill. 358, 364; *Bickley v. Bank*, 39 S. C. 281.

tain.”⁵⁷ Le Blanc, J., says, “We see the good sense of the rule which requires previous notice to be given. . . that he may not be taken by surprise.”⁵⁸ And Ellenborough, L. C. J., says, “The reason of giving notice . . . was to check a person from giving in evidence what was a false copy.”⁵⁹ All of these reasons, however, are also erroneous. The true reasons are, (1) to enable the party in possession of it to produce it if he chooses to do so; and (2) to meet the argument that the party has not taken all reasonable means to procure the original which he is bound to do before he can be permitted to introduce secondary evidence.⁶⁰ If he knows that the original is in the hands of the adverse party, or under his control, it is his duty to make all reasonable efforts to obtain it; and he performs this duty by giving him reasonable notice to produce it. As said by Porter, J., “The elementary principle, which requires the best evidence the nature of of the case permits of shall be produced . . . refuses to a party permission to give secondary evidence of a written document on the ground of its being in possession of his adversary, until he has shown that by giving notice to that adversary to produce it, he has used every exertion in his power that the best evidence might

57. *Williams v. Benton*, 12 La. Ann. 91.

58. *How v. Hall*, 14 East, 274, 276.

59. *Sturtees v. Hubbard*, 4 Esp. 203.

60. *McDowell v. Ætna Ins. Co.*, 164 Mass. 444, 41 N. E. R. 665; *Dwyer v. Collins*, *supra*.

be had.”⁶¹ And as said by Tilghman, J., “Notice must be served on him or his attorney to produce it, because otherwise it cannot appear that the prosecutor might not have had the original if he had chosen to call for it.”⁶²

§ 10. **Original in hands of third party.**—As a general rule, where the original is in the hands of a third party notice to produce it is essential. And according to many decisions a *subpoena duces tecum* should be served on him.⁶³ Some courts, however, have held that this is unnecessary.⁶⁴

In some cases notice to produce the original is not essential. Thus, where the third party fraudulently suppresses the original, notice to produce it is not essential.⁶⁵

§ 11. **Rule where the original is outside the jurisdiction of the court.**—Some courts hold that where the document is beyond the jurisdiction of the court secondary evidence of its contents is admissible without making any effort to produce the original.⁶⁶ This view has been ex-

61. *Abot v. Rion*, 9 Mart. (La.) 465, 467.

62. *Com. v. Messinger*, 1 Binn. 273, 274.

63. *Whitford v. Tutin*, 10 Bing. 395; *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 60, 63.

64. *United States v. Reyburn*, 6 Pet. (U. S.) 352, 365.

65. *Blevins v. Pope*, 7 Ala. 371, 375; *Gray v. Pentland*, 2 Sarg. & R. (Penn.) 23, 31.

66. *Miles v. Stevens*, 142 Mass. 571; *Memphis & C. Ry. Co. v. Hembree*, 84 Ala. 182; *Elwell v. Mersick*, 50 Conn. 272; *Fosdick v. Van Horn*, 40 Ohio St. 459; *Smith v. Traders' Nat. Bank*, 82 Tex. 368.

pressed by the supreme court of the United States as follows: "It is well settled that if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence without further showing may be given to prove the contents of such papers, and notice to produce them is unnecessary."⁶⁷ Other courts hold the contrary.⁶⁸ The better view is that if the party having custody of the original refuses to part with it, or produce it in court, his deposition should be taken and a copy of the original be attached to the deposition.⁶⁹

§ 12. What constitutes due notice to produce the original in court.—As previously stated, what constitutes reasonable notice depends upon the circumstances of the particular case. If the document is shown to be in court a request made at the trial to produce it is sufficient.⁷⁰ Moreover, the adverse party, or his attorney,

67. *Burton v. Driggs*, 20 Wall. (U. S.) 134.

68. *Shaw v. Mason*, 10 Kan. 184; *Knowlton v. Knowlton*, 84 Me. 283; *Mandel v. Swan Land & Co.*, 154 Ill. 177; *Pringey v. Gass*, 16 Okla. 82, 86 Pac. R. 292; *Wiseman v. Northern Pac. Ry. Co.*, 20 Ore. 425, 23 Am. St. Rep. 135, and note.

69. *Phillips v. U. S. Benef. Soc.*, 120 Mich. 149, 79 N. W. R. 1; *Kearney v. Mayor*, 92 N. C. 617; *Binney v. Russell*, 109 Mass. 55.

70. *Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; *Overlock v. Hall*, 81 Me. 348, 17 Atl. R. 169; *Downer v. Button*, 26 N. H. 338; *Brown v. Isbell*, 11 Ala. 1009.

may be compelled to disclose the fact that the instrument is in court, or easy of access.⁷¹ Where the instrument is not in court, or not easy of access, the minimum length of time allowable between the notice and the trial rests in the sound discretion of the court.⁷² A reasonable opportunity to produce the paper should be afforded the party.⁷³ Where the paper is easy of access, notice given after the trial has been commenced has been held sufficient.⁷⁴ Notice four days before the trial, where the party lived twelve miles away, has been held sufficient.⁷⁵ And notice nine days before the trial, where the party lived one hundred and eighty miles away, has been held sufficient.⁷⁶ On the other hand, notice one day before the trial, where the party lived eighty miles away, has been held insufficient.⁷⁷ As a general rule, notice given during the trial is insufficient, except where the paper is in court or is easy of access.⁷⁸

71. *Brandt v. Klein*, 17 Johns. (N. Y.) 335.

72. *Barton v. Kane*, 17 Wis. 38, 84 Am. Dec. 728; *Bourne v. Buffington*, 125 Mass. 481; *Jack v. Rowland*, 98 Ill. App. 352.

73. *Pitt v. Emmons*, 92 Mich. 542; *McDonald v. Carson*, 95 N. C. 377; *Bushnell v. Bishop Hill Colony*, 28 Ill. 204; *Lawrence v. Clark*, 14 M. & W. 250.

74. *Board of Justices v. Fennimore*, 1 N. J. L. 242; *Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661; *Utica Ins. Co. v. Caldwell*, 3 Wend. (N. Y.) 296.

75. *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

76. *Jackson v. Marsh*, 1 Caines (N. Y.) 153.

77. *Cody v. Hough*, 20 Ill. 43.

78. *Welsh v. New York, etc., Ry. Co.*, 176 Mass. 393, 57 N.

§ 13. Rule where the document is privileged.

—Where a document is privileged, and the adverse party fails to produce it, after notice to do so, secondary evidence of its contents is admissible.⁷⁹ And where a document is in the hands of counsel of the adverse party, while he cannot be compelled to produce it, or disclose its contents, he may be required to disclose the fact that it is in his possession; and upon failure to produce it after notice secondary evidence of its contents is admissible.⁸⁰

It has been held that where the writing is a privileged document secondary evidence of its contents is admissible without giving notice to produce it.⁸¹ "If in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if the production were physically impossible."⁸²

§ 14. Rule where the writing itself is inadmissible.—If, for any reason, the document itself is inadmissible secondary testimony of its contents

E. R. 668; *Dade v. Ætna Ins. Co.*, 54 Minn. 336, 56 N. W. R. 48.

79. *Calcraft v. Guest*, 1 Q. B. D. 759, 10 M. & W. 478, 67 L. J. Q. B. 505; 46 Wkly. Rep. 420; *Speiser v. Phoenix Mut. L. Ins. Co.*, 119 Wis. 530, 97 N. W. R. 207.

80. *Jackson v. McVey*, 18 Johns. (N. Y.) 335.

81. *State v. Durham*, 121 N. C. 546, 28 S. E. R. 26 (original in hands of wife who claimed privilege.).

82. *Per Pollock*, C. B., in *Sayer v. Glossop*, 3 Exch. 409, 410.

is also inadmissible.⁸³ Thus, where the document has an attesting witness, who is living and within the jurisdiction of the court, and he is not produced or his absence satisfactorily accounted for, secondary evidence is not admissible.⁸⁴ It is to be observed, however, that the inadmissibility of a document does not exclude secondary evidence of a fact relating to it, and which may be proved independently of it.⁸⁵

§ 15. Rule where the document is executed in duplicate.—Where the document is executed in duplicate each is primary evidence; and either is admissible without giving notice to produce the other.⁸⁶ If they vary, the adverse party in such case can rebut the other party's duplicate.

§ 16. Where the pleadings give notice.—Where the pleadings are of such a nature that the adverse party is apprised of the fact that a particular document in his possession, or under his control, may be needed to contradict his evidence, secondary evidence is admissible without further notice to produce it.⁸⁷ Thus, in an action

83. *Peck v. Valentine*, 94 N. Y. 569; *Street v. Kelly*, 67 Ala. 478; *Baldrige v. Peuland*, 68 Tex. 441, 41 S. W. R. 565.

84. *Street v. Kelly*, *supra*; *Gage v. Wilson*, 17 Me. 378.

85. *People v. Leonard*, 106 Cal. 302, 39 Pac. R. 617; *Sparks v. Rawles*, 17 Ala. 211.

86. *Hollenbeck v. Stanberry*, 38 Ia. 325; *Cleveland Ry. Co. v. Perkins*, 17 Mich. 296; *Doe v. Somerton*, 7 Q. B. D. 58.

87. *Lawson v. Bachman*, 81 N. Y. 616; *Cross v. Williams*, 72 Mo. 577; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. W. R. 242, 59 Am. Rep. 810; *Pennington v. Schwartz*, 70 Tex. 211, 8 S. W. R. 32; *Rose v. Lewis*, 10

in assumpsit for the non-delivery of a certain document;⁸⁸ or in trover for a certain document;⁸⁹ or in assumpsit to recover the amount of a forged bank note returned to defendant;⁹⁰ or in tort against a telegraph company for not delivering a telegram;⁹¹ or in tort against a constable for failing to return an execution;⁹² or in contract for a breach of warranty,⁹³ notice to produce the document is not essential. Nor is notice to produce an illegal agreement necessary in an action for conspiracy in restraint of trade.⁹⁴ "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such instrument, there can be no necessity for giving him further notice."⁹⁵ While the rule is peculiarly applicable to prosecutions for larceny and forgery, it is also applicable to some other criminal actions.⁹⁶ In

Mich. 483; *State v. Mayberry*, 48 Me. 218; *McMillan v. Bonley*, 112 N. C. 578, 16 S. E. R. 845 (notice of sale).

88. *Jolley v. Taylor*, 1 Camp. 143.

89. *Rose v. Lewis*, *supra*; *Hotchkiss v. Mosher*, 48 N. Y. 478; *How v. Hall*, 41 East 274.

90. *Bruce v. Ross*, 1 Day (Conn.) 100.

91. *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620, *contra*, *Western Union Tel. Co. v. Hopkins*, 49 Ind. 227.

92. *Wilson v. Gale*, 4 Wend. (N. Y.) 623.

93. *Nichols & S. Co. v. Charlebois*, 10 N. D. 446, 88 N. W. R. 80.

94. *State v. Dreany*, 65 Kan. 292, 69 Pac. R. 182.

95. *How v. Hall*, *supra* (trover for a bond).

96. *State v. Mayberry*, *supra* (criminal conspiracy to obtain

some cases it is essential that the adverse party be charged in the pleadings with the possession of the document.⁹⁷ "The exception to the rule is when the other party is by the proceeding itself charged with the possession of the document."⁹⁸ Thus a landlord's notice to a tenant to quit,⁹⁹ a notice of an assessment,¹⁰⁰ a notice to a saloonkeeper by a wife not to sell her husband liquor,¹ a notice to a merchant by a husband not to sell his wife goods on his credit;² and a notice by the payee to a surety,³ are sufficient of themselves to allow the introduction of secondary evidence of their contents if the originals are not produced.

§ 17. **Where the document is not primary evidence.**—The rule which requires that notice be given to produce a document, to justify the admission of secondary evidence of its contents, does not apply to an instrument which does not constitute primary evidence of the facts to be proved. Thus, where the facts to be proved are the contents of a copy of the original, where the

promissory note); *R. v. Elworthy*, 10 Cox Cr. Cas. 579, 582 (perjury).

97. *R. v. Elworthy*, *supra*.

98. *R. v. Elworthy*, *supra*,

99. *Falkner v. Beers*, 2 Doug. (Mich.) 117, 119; *Hawley v. Robinson*, 14 Neb. 435, 16 N. W. R. 438.

100. *Williams v. Ins. Co.*, 68 Ill. 387, 390.

1. *Loranger v. Jardine*, 56 Mich. 518.

2. *Barr v. Armstrong*, 56 Mo. 577, 586.

3. *Brown v. Booth*, 66 Ill. 419.

latter is lost or destroyed, notice to produce the copy is not essential.⁴

§ 18. **Where possession of the document is acquired wrongfully.**—Where the adverse party has acquired possession of a document wrongfully, secondary evidence of its contents is admissible without giving him notice to produce it. Thus, where he has acquired possession of the instrument by force or fraud;⁵ or acquired possession of it from a third party who has been subpoenaed to bring it into court;⁶ or where he is charged with the larceny,⁷ or forgery,⁸ of a document in his possession, notice is not essential to the admissibility of secondary evidence of its contents.

§ 19. **Where the primary evidence cannot be produced.**—Where a document is lost, or has been accidentally destroyed, notice to produce it is not essential. In the former case secondary evidence of the contents of the instrument is admissible upon showing that a reasonable search was made for it and that the search was unsuccessful. Where the instrument has been voluntarily destroyed, by the party who seeks to in-

4. *Hirschfelder v. Levy*, 69 Ala. 351.

5. *Neally v. Greenough*, 25 N. H. 325; *State v. Mayberry*, 48 Me. 218; *Hamilton v. Rice*, 15 Tex. 382.

6. *Scott v. Pentz*, 5 Sandf. (N. Y.) 572; *Leeds v. Cook*, 4 Esp. 256.

7. *McGinnis v. State*, 24 Ind. 500 (larceny of a treasury note).

8. *R. v. Haworth*, 4 C. & P. 254, 256 (forgery of a deed).

troduce secondary evidence of its contents, he must first satisfy the court that the destruction of the instrument was without fraudulent design.⁹ The voluntary destruction of the instrument, without explanation, raises a presumption of fraudulent design; and secondary evidence in such case is inadmissible.¹⁰ But the destruction of the instrument thru mere negligence will not exclude secondary evidence of its contents.¹¹ Where the instrument is destroyed accidentally, or by mistake, or under an erroneous impression that it is of no value or importance, secondary evidence of its contents is admissible.¹² And where it is destroyed in the usual course of business, in the belief that its usefulness is gone, secondary evidence is admissible.¹³

Where the instrument is voluntarily destroyed by the adverse party secondary evidence of its contents is admissible.¹⁴

9. Wallace v. Harmstad, 44 Pa. St. 492; Blake v. Fash, 44 Ill. 302; West v. New York Cent., etc., Ry. Co., 55 N. Y. 464, 67 N. Y. Suppl. 104; Riggs v. Taylor, 9 Wheat. (U. S.) 483.

10. Bagley v. McMickle, 9 Cal. 430.

11. Rodgers v. Crook, 97 Ala. 722, 12 So. R. 108.

12. Davis v. Teachout, 126 Mich. 135, 85 N. W. R. 475, 86 Am. St. Rep. 531; Schroeder v. Michel, 98 Mo. 43, 11 S. W. R. 314; Murphy v. Olberding, 107 Ia. 547, 78 N. W. R. 205.

13. Steel v. Lord, 70 N. Y. 280, 28 Am. Rep. 602; Pollock v. Wilcox, 68 N. C. 46; Davis v. Teachout, *supra*.

14. Lucas v. Brooks, 23 La. Ann. 117; McNutt v. McNutt, 116 Ind. 545, 19 N. E. R. 115, 2 L. R. A. 372.

§ 20. **Same. Where the primary evidence is in possession of another court.**—If the primary evidence is in the custody of another court of the same state, secondary evidence of its contents is not admissible unless it appears that it cannot be produced after reasonable efforts are made to obtain it.¹⁵ Where it is on file in the same court secondary evidence of its contents is inadmissible.¹⁶

§ 21. **Same. Where the primary evidence is in the custody of the government.**—Where the primary evidence is on file at Washington among the records of the federal government secondary evidence of its contents is admissible. Thus, where the document is on file in the navy department;¹⁷ or in the war department;¹⁸ or in the land office department;¹⁹ secondary evidence of its contents is admissible; and where a document is on file with the interstate commerce commission secondary evidence of its contents is admissible.²⁰

§ 22. **Where the primary evidence is beyond the territorial jurisdiction of the court.**—Where

15. *Mount v. Scholes*, 120 Ill. 394, 11 N. E. R. 401; *Crafts v. Daugherty*, 69 Tex. 477; *Ingle v. Jones*, 43 Ia. 286; *Earnest v. Napier*, 15 Ga. 306.

16. *Dare v. McNutt*, 1 Ind. 148.

17. *Carpenter v. Bailey*, 56 N. H. 283.

18. *Leathers v. Salvor Wrecking, etc., Co.*, 15 Fed. Cas. No. 8,164, 2 Woods 680.

19. *Beauvais v. Wall*, 14 La. Ann. 199.

20. *Gulf, etc., Ry. Co. v. Dimmitt*, 17 Tex. Civ. App. 255, 42 S. W. R. 583.

the primary evidence is out of the jurisdiction of of the court some courts hold that secondary evidence of its contents is admissible without making an effort to produce the original.²¹ Other courts hold the contrary.²² But where the evidence shows that efforts to produce the primary evidence would be fruitless, even the latter courts hold that secondary evidence is admissible without showing that any effort has been made to produce the primary evidence.²³ If the primary evidence is in the custody of a foreign court, and cannot be removed therefrom, secondary evidence of its contents is, of course, admissible.²⁴ It has been held, however, that the mere fact that the primary evidence is on file in a foreign court does not excuse the party, desiring to introduce secondary evidence of its contents, from

21. *Shirley v. Hicks*, 105 Ga. 504, 31 S. E. R. 105; *Zellerback v. Allenberg*, 99 Cal. 57, 33 Pac. R. 786; *Danforth v. Tenn., etc., Ry. Co.*, 99 Ala. 331, 13 So. R. 51; *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562.
22. *Shaw v. Mason*, 10 Kan. 184; *Waite v. High*, 96 Ia. 742, 65 N. W. R. 397; *Wiseman v. North. Pac. Ry. Co.*, 20 Ore. 425, 26 Pac. R. 272, 23 Am. St. Rep. 135.
23. *People v. Seaman*, 107 Mich. 348, 65 N. W. R. 203, 61 Am. St. Rep. 326; *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. R. 368, 44 Am. St. Rep. 354; *State v. Sterling*, 41 La. Ann. 679, 6 So. 583; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 41 N. E. R. 765, 48 Am. St. Rep. 317.
24. *Otto v. Trump*, 115 Pa. St. 425, 8 Atl. R. 786; *Lord v. Staples*, 23 N. H. 448; *Casey v. Williams*, 51 N. C. 578.

making a reasonable effort to produce the original.²⁵

§ 23. **Consequences of non-production of the primary evidence.**—As already stated, one consequence of the non-production of the primary evidence, after due notice to produce it, is the admissibility of secondary evidence of its contents. Another important consequence is it estops the adverse party from subsequently introducing it to contradict or rebut the secondary evidence.²⁶ As said by Alderson, B., "You must either produce a document when it is called for or never."²⁷ And as said by Gray, C. J., "A party who has suppressed a written document, and refused to produce it upon notice, and so compelled the adverse party to resort to secondary evidence thereof, is not afterwards entitled to offer proof of its contents."²⁸ Not only is he estopped from introducing the original, but also from introducing secondary evidence of its contents.²⁹ Some courts, however, have repudiated this rule. In criticising it, Campbell, C. J., says: "It is not a rule calculated to further the eliciting of truth ;

25. *Crispin v. Doglioni*, 32 L. J. P. & M. 109, 8 L. T. Rep. N. S. 91; 3 Swab. & Tr. 44, 11 Wkly. Rep. 500.

26. *Platt v. Platt*, 58 N. Y. 646; *Barnes v. Lynch*, 9 Okla. 156, 56 Pac. R. 995; *Gage v. Campbell*, 131 Mass. 566; *Cahen v. Life Ins. Co.*, 69 N. Y. 300; *Doon v. Donahue*, 113 Mass. 151; *Thompson v. Hodgdon*, 12 Adol. & Ell. 135.

27. *Doe v. Cockell*, 6 C. & P. 525, 528.

28. *Gage v. Campbell*, *supra*.

29. *Gage v. Campbell*, *supra*.

it is simply an attempt to furnish one party by allowing his adversary to recover what does not belong to him, or to defend unjustly against a proper claim."³⁰ Another consideration is that the adverse party who refuses to produce primary evidence after receiving notice to do so may be compelled by a *subpoena duces tecum* to produce it.³¹ Another probable consequence of his refusal to produce the primary evidence is that the jury will draw inferences from the refusal unfavorable to him. In some states there are statutes which entitle a party to discovery and inspection; and under some of these statutes judgment by default may be entered in some cases against the adverse party who has refused to produce the primary evidence. Others expressly prohibit him from subsequently producing the instrument at the trial.³²

§ 24. **Recorded documents.**—Under the registration system which obtains in this country, statutes generally provide that properly certified copies of a large class of recorded documents are to be considered the same as primary evidence.³³

30. *Moulton v. Mason*, 21 Mich. 363, 370. See also, *Tewksberry v. Schulenberg*, 48 Wis. 577, 580; *State v. Marsh*, 70 Vt. 288, 40 Atl. R. 836 (rests largely in the sound discretion of the trial court).

31. *Moulton v. Mason*, *supra*.

32. *Wigmore on Evid.*, § 1858.

33. *Doe v. Ross*, 7 M. & W. 102; *Broom v. Woodman*, 6 Car. & P. 205, 25 E. C. L. 396; *Rex v. Hunt*, 3 B. & Ald. 506.

25. Degrees of secondary evidence.—According to the English rule there are no degrees of secondary evidence. As said by Phillipps, "In secondary evidence there are no degrees, no precedence in point of admissibility."³⁴ According to this rule, oral evidence of the contents of a document is equally admissible with a written or letter-press copy of it.³⁵ And oral evidence of the testimony of a deceased witness is equally admissible with the court stenographer's record of it, where the latter has not been made primary evidence by statute.³⁶ As said by Starkie, "With reference to the question of admissibility there are no degrees of secondary evidence, but where it is admissible at all, even parol evidence may be received, notwithstanding an attested copy or other better secondary evidence is in existence."³⁷ And a similar view is also expressed by Best³⁸ and Taylor.³⁹

In this country both the courts and the text writers are at variance upon this question. Some favor the English rule;⁴⁰ but the great weight

34. 2 Phillipps on Evid. (10th Eng. ed.) 568.

35. Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469.

36. Jeans v. Wheedon, 2 Moo. & Rob. 486; Rex v. Christopher, 4 Cox Cr. Cas., 76; State v. McDonald, 65 Me. 466.

37. Starkie on Evid. (8th Am. ed.) 544.

38. Best on Evid. (1st Am. ed.) § 483.

39. Taylor on Evid., § 495; Rawlings v. Y. M. C. A., 48 Neb. 216, 66 N. W. R. 1124.

40. Rawlings v. Y. M. C. A., 48 Neb. 216; Dix v. Akers, 30 Ind. 431; Com. v. Smith, 151 Mass. 491, 24 N. E. R. 677; Magie v. Hermann, 50 Minn. 424, 52 N. W. R. 909, 36

of authority is to the contrary.⁴¹ The latter view may be said to constitute the American rule. As said by Elliott, "The rule established, and clearly deducible from the majority of American authorities, however, as to secondary evidence, is the same in effect as the rule between primary and secondary evidence; that is, that when secondary evidence is properly admissible, it must be the best that in the nature of the case can be produced, or the best kind of that character of evidence which appears to be in the power of the party to produce."⁴² This view obtains in the federal courts. "The principle established by this court as to secondary evidence . . . is, that it must be the best the party has in his power to produce."⁴³ Letter-press copies are considered the best secondary evidence of their contents; and according to the American rule parol

Am. St. Rep. 660; *Mauney v. Crowell*, 84 N. C. 314. See also, *Mattocks v. Stearns*, 9 Vt. 326; *Belk v. Meagher*, 3 Mont. 65.

41. *Stevenson v. Hoy*, 43 Pa. St. 191; *Illinois Land Co. v. Bonner*, 75 Ill. 315; *Protection Life Ins. Co. v. Dill*, 91 Ill. 174; *Johnson v. Ashland Lumber Co.*, 52 Wis. 458; *Nason v. Jordan*, 62 Me. 480; *Davies v. Pettitt*, 11 Ark. 349; *Blade v. Noland*, 12 Wend. (N. Y.) 173, 27 Am. Dec. 305; *Higgins v. Reed*, 8 Ia. 298, 74 Am. Dec. 305; *Martin v. Brand*, 182 Mo. 116, 81 S. W. R. 443; *Williams v. Waters*, 36 Ga. 454; *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344; *Western Union Tel. Co. v. Hines*, 94 Ga. 430, 20 S. E. R. 349.

42. 2 Elliott on Evid. 515.

43. *Cornett v. Williams*, 20 Wall. (U. S.) 226. See also, *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, 587.

evidence of their contents is inadmissible, unless their absence is satisfactorily accounted for.⁴⁴ A duplicate is of a higher grade than an examined copy; and an examined copy is of a higher grade than oral testimony.⁴⁵ Oral evidence of the contents of a lost or destroyed will is inadmissible where a copy of the will can be produced.⁴⁶ Oral evidence of a lost deed is inadmissible where the record, or a certified copy thereof, can be produced.⁴⁷ Oral evidence of the contents of a letter is inadmissible where a *fac-simile* of the original can be produced.⁴⁸ The contents of an original document may not be proved by a copy of a certified copy of the original document.⁴⁹

According to the English rule oral evidence of the contents of a lost deed is admissible although a record of it exists and can be produced.⁵⁰ And according to this rule oral evidence of a lost or destroyed letter is admissible

44. *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. R. 403; *Stevenson v. Hoy*, *supra*.

45. *Shedden v. Heard*, 110 Ga. 461, 467, 35 S. E. R. 707 ("There are degrees of secondary evidence and the best should always be produced. Thus a duplicate is better than a copy, and an examined copy than oral evidence.").

46. *Illinois Land, etc., Co. v. Bonner*, *supra*.

47. *Aurora Bank v. Linzee*, 166 Mo. 496, 65 S. W. R. 735; *Mariner v. Saunders*, 10 Ill. 113; *Brotherton v. Mart*, 6 Cal. 488.

48. *Stevenson v. Hoy*, *supra*.

49. *Dyer v. Hudson*, 65 Cal. 372.

50. *Simpson v. Edens*, 14 Tex. Civ. App. 235, 38 S. W. R. 474.

without accounting for an existing copy of it.⁵¹ In the case of a lost letter oral evidence of its contents may be given by any one who has personal knowledge of the same, even when the party who received the letter is in court.⁵²

Where a deed is on record in the office of the register of deeds, and also on record in the office of the secretary of state, and the deed is lost, and a copy of each record is made, either copy is admissible.⁵³ Where by statute, certified or examined copies are made admissible as primary evidence, parol evidence is inadmissible in the absence of proof that certified copies are not attainable.⁵⁴ All the courts sustain this rule. It is peculiarly applicable to certified or examined copies of public records.

§ 26. Application of the best evidence rule to telegrams.—The best evidence rule is applicable to telegrams the same as to other writings. Secondary evidence is inadmissible where the primary evidence is available.⁵⁵ The courts are not agreed, however, as to what constitutes the primary evidence. Some hold that it is the writ-

51. *Brown v. Woodman*, 6 C. & P. 206, 25 E. C. L. 396.

52. *Drish v. Davenport*, 2 Stew. (Ala.) 266.

53. *Osborne v. Ballew*, 29 N. C. 415.

54. *Robertson v. DuBoise*, 76 Tex. 1; *Culver v. Uthe*, 133 U. S. 655; *Redd v. State*, 65 Ark. 475, 47 S. W. R. 119.

55. *Barons v. Brown*, 25 Kan. 410; *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. R. 105; *McCormick v. Joseph*, 83 Ala. 401; *Blair v. Brown*, 116 N. C. 631; *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. R. 324; *Western Union Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. R. 187.

ten message delivered by the sender to the telegraph company for transmission. Others hold that it is the written message delivered by the telegraph company to the party to whom it is sent. The latter view is the English rule,⁵⁶ while the former is the American rule.⁵⁷ The question is, whose agent is the telegraph company? If it is the agent of the sender the American rule is correct. If it is the agent of the party to whom the telegram is sent the English rule is correct.⁵⁸

According to the American rule, if the telegram is lost, or destroyed in good faith, after it is received by the party to whom it is sent, oral evidence is not admissible without satisfactorily accounting for the non-production of the written message delivered to the telegraph company for transmission.⁵⁹ This is owing to the fact that the written message delivered by the company to the party to whom it is sent is considered the primary evidence; and to the further fact that the written message delivered to the company for transmission is better secondary evidence of the contents of the telegram than the oral evidence. On the other hand, according to the English rule, if the written message delivered to the company for transmission is lost, or destroyed in good faith, oral evidence of its con-

56. *Henkel v. Pape*, L. R. 6 Exch. 7.

57. *Nickerson v. Spindell*, *supra*; *Anheuser Brewing Co. v. Hutmacher*, 127 Ill. 652; *Saveland v. Green*, 40 Wis. 431.

58. *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88.

59. Cases cited in foot-note 57.

tents is admissible without accounting for the non-production of the written message delivered to the party to whom the telegram is sent.⁶⁰ This is owing to the fact that the written message delivered to the company for transmission is considered the primary evidence; and to the further fact that according to the English view there are no degrees of secondary evidence. The oral evidence and the written message delivered to the party to whom the telegram is sent are, according to the English view, secondary evidence of equal grade:

Under either rule, to render secondary evidence admissible the genuineness of the original must be shown.⁶¹ Where the original is beyond the jurisdiction of the court, it has been held that secondary evidence of its contents is admissible.⁶² It also has been held that where it is customary for the company to destroy messages after a certain time, secondary evidence of their contents may be admitted after that time.⁶³

60. *Henkel v. Pape*, *supra*.

61. *Cobb v. Glenn Boom & L. Co.*, 57 W. Va. 49, 110 Am. St. Rep. 734 and note pp. 764-771; *Reynolds v. Hendricks*, 16 S. D. 602, 94 N. W. R. 694; *Lewis v. Havens*, 40 Conn. 363.

62. *Whilden v. Merch. Bank*, 64 Ala. 1, 38 Am. Rep. 1, and note; *Barons v. Brown*, 25 Kan. 410; *Elwell v. Mersick*, 50 Conn. 272.

63. *Western Union Tel. Co. v Collins*, 45 Kan. 88, 25 Pac. R. 187; *Riordan v. Guggerty*, 74 Ia. 688, 39 N. W. R. 107; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221.

Where there is only one telegram transmitted it seems clear that the telegraph company is the agent of the party who sends the message. It follows, therefore, that in such case the primary evidence is the written message received by the party to whom the telegram is sent.⁶⁴ This is in accord with the American rule. Where an *order* is sent by telegraph, the company is the agent of the sender; and the written message delivered to the party to whom the telegram is sent is the primary evidence.⁶⁵ Where a reply telegram is sent, imposing new conditions, the written message received is the primary evidence.⁶⁶

Where a telegram is relied upon to establish a material fact, or to sustain the action, a copy of the message sent has been held inadmissible, unless it is shown that the original message left at the transmitting office is proved to be lost, or destroyed in good faith, or that the original message, and the office from which it was sent, are beyond the jurisdiction of the court.⁶⁷ The genuineness of a telegram may be shown by proving the handwriting of the sender, or by proving that it was sent by his direction or authority.⁶⁸

64. *Anheuser Brewing Co. v. Hutmacher*, 127 Ill. 652; *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. R. 105.

65. *Western Union Tel. Co. v. Shatter*, 71 Ga. 760; *Slave-land v. Green*, 40 Wis. 431.

66. *Durkee v. Vermont C. Ry. Co.*, 29 Vt. 127.

67. *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

68. *Whilden v. Merchants' Bank*, 64 Ala. 1; *United States v. Babcock*, 3 Dill. (U. S.) 576.

It has been held, however, that a reply telegram, answering questions asked the sender by a previous telegram addressed to him, is sufficient proof of his receipt of the latter to justify its admission in evidence against him.⁶⁹

§ 27. Application of the best evidence rule to telephonic communications.—Strictly speaking, the best evidence rule has but slight application to conversations thru a telephone. By analogy, however, the courts have broadened the scope of the rule by applying it to telephonic communications. Where two persons converse thru a telephone the central operator is regarded as the agent of both parties.⁷⁰ The conversation in such case is not hearsay. It is regarded as the declaration of an agent, made within the scope of the agency relation, during the progress of a transaction in which the operator acts as the representative of the two principals.⁷¹ Where the person who receives the message recognizes the voice of the sender there can be but slight objection, if any, to his being allowed to testify to the communication received.⁷² And where the conversation is carried on thru a telephone in a business house or office the conversation is admissible, even although the voice is not recog-

69. *State v. Sawtelle*, 66 N. H. 488.

70. *Oskamp v. Gadsden*, 35 Neb. 7, 37 Am. St. Rep. 428 and note, 17 L. R. A. 440 and note; *Sullivan v. Kuykendall*, 82 Ky. 486, 56 Am. Rep. 901-906.

71. *Oskamp v. Gadsden*, 35 Neb. 7.

72. *Lord Elec. Co. v. Morrill*, 178 Mass. 304.

nized.⁷³ "When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business then carried on; and the fact that the voice at the telephone was not identified does not render the conversation inadmissible."⁷⁴ But testimony of a conversation by telephone between the plaintiff and some one at the defendant's place of business is not admissible against the defendant in the absence of proof as to the identity of the person with whom the plaintiff conversed.⁷⁵ Where an intermediary carries on a conversation by telephone with A, and repeats it to B, some courts hold that in an action between A and B the conversation, if material, is admissible against B, on the ground that the intermediary, in such case, acts as B's agent.⁷⁶ Other

73. *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861, 866; *People v. Ward*, 3 N. Y. Crim. R. 483, 511.

74. *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331.

75. *Obermann Brewing Co. v. Adams*, 35 Ill. App. 540; *Lord Electric Co. v. Morrill*, 178 Mass. 309, 59 N. E. R. 807; *Shawyer v. Chamberlain*, 113 Ia. 742, 84 N. W. R. 661; *Deering & Co. v. Shimpik*, 67 Minn. 348, 69 N. W. R. 1088.

76. *Sullivan v. Kuykendall*, *supra*.

courts, however, hold the contrary, on the ground that the conversation is hearsay.⁷⁷ A bystander in a telephone office may testify to the part heard by him of a conversation by telephone, where it is shown *aliunde* to have been between the parties to the suit and upon the subject matter thereof.⁷⁸ Where a notary takes an acknowledgement by telephone, and the evidence shows that the nature and contents of the instrument were correctly stated to the party executing it, and no fraud appears, the acknowledgement is valid.⁷⁹ An answer by telephone, purporting to have been sent by the defendant in reply to a question sent thru the same medium by the plaintiff, is admissible in evidence without positive proof that it was sent by the defendant.⁸⁰

§ 28. **Presumption and burden of proof as to secondary evidence.**—As previously stated, in England there are no degrees of secondary evidence; but in this country, by the weight of authority, the contrary view obtains. In jurisdictions which sustain the latter view, when a foundation has been laid for the introduction of secondary evidence, that which is offered is presumed to be the best of its kind attainable; and the party who refutes it has the burden of show-

77. *Wilson v. Coleman*, 81 Ga. 297; *German Savings Bank v. Citizens' Nat. Bank*, 101 Ia. 530, 70 N. W. R. 769.

78. *Miles v. Andrews*, 153 Ill. 262.

79. *Banning v. Banning*, 80 Cal. 271.

80. *Globe Printing Co. v. Stahl*, 23 Mo. App. 451. For notes on this subject see 10 Am. St. Rep. 135; 17 L. R. A. 440.

ing the contrary. "Where satisfactory proof is made of loss or inability to produce an instrument which the law does not make provision for recording and copying, and the evidence fails to disclose the existence of any copy or other evidence better than parol (oral) known to the offering party and within his power to produce, and there is nothing appearing to indicate a copy, or fraud or deception, then the presumption arises that there is no copy or other evidence better than parol within the power of the party to produce, a *prima facie* case is made for the admission of parol testimony of the contents of the instrument, and such testimony will be admitted, unless the objecting party will produce the better evidence or show that it does exist and was known to and might have been produced by the offering party."⁸¹ But the burden of showing facts which constitute a proper foundation for the introduction of secondary evidence, such as loss of the original, reasonable search for it and failure to find it; or, destruction of the original, inaccessibility of it, etc., rests upon the party who seeks to introduce the secondary evidence.⁸²

81. C. C. C. & St. L. Ry. Co. v. Newlin, 74 Ill. App. 638, 647.

82. Dyer v. Fredericks, 63 Me. 173; Hansen v. Amer. Ins. Co., 57 Ia. 741, 11 N. W. R. 670; Emig v. Diehl, 78 Pa. St. 359.

CHAPTER IV.

The Parol Evidence Rule.

§ 1. **The rule.**—The parol evidence rule, briefly stated, is as follows: Verbal testimony is inadmissible to vary, add to, or contradict the contents of a document, or to modify its legal import.

§ 2. **Scope of the rule.**—Originally, the rule was confined to sealed documents; but in 1771 the English Court of Common Pleas extended it to documents not under seal.¹ It is now applicable to contracts, deeds, mortgages, assignments, promissory notes, wills, judgments and other judicial proceedings, and to all other transactions which have been reduced to writing and are evidenced by a document or a series of documents.

§ 3. **Misleading use of the term "parol."**—The term "parol," which is of French origin, has various meanings. It has a literal meaning and several conventional meanings. Its literal meaning is *word*, or *speech*. In this sense it is synonymous with the term "oral." In the law of contracts, pleadings and evidence it has a conventional meaning. A parol contract is one not under seal. It may be oral, or in writing. It is a simple contract, as distinguished from a contract under seal. In the law of pleadings the

1. *Meres v. Ansell*, 3 Wills, Com. Pleas 275.

term "parol" signifies the pleadings themselves.² And in the law of evidence it is applicable to both oral statements and written statements *de hors* the particular document.

Since the term "oral" is confined to spoken words, and the term "verbal" is applicable to both spoken and written words, it follows that, in stating the parol evidence rule, the latter term is preferable to the former. The two terms, however, are frequently used interchangeably, but often incorrectly so.

§ 4. **Same. Statement by Dean Wigmore.**—As regards the vagueness of the use of the term "parol," Dean Wigmore says: "The matter excluded by the rule is not inherently or even most commonly anything that can properly be termed 'parol.' That word (in spite of its numerous other derived applications) signifies and implies essentially the idea 'oral,' *i. e.* matter of speech, as contrasted with matter of writing. Now, so far as the phrase 'parol evidence rule' conveys the impression that what is excluded is excluded because it is oral—because somebody spoke or acted other than in writing, or is now offering to testify orally—that impression is radically incorrect. When the prohibition of the rule is applicable, what is excluded may equally be written as oral,—may be letters and telegrams as well as conversations; and where the prohibition is applicable on the

2. Bouvier's Law Dict. 576. See also, Professor Thayer's scholarly article in 6 Harvard Law Review 325, and the excellent note in 56 Am. St. Rep. 659.

facts to certain written material, nevertheless for the very same transaction certain oral material may not be prohibited. So that the term 'parol' not only affords no necessary clue to the material excluded, but is even positively misleading. It must be understood to be employed in a purely unnatural and conventional sense."³

§ 5. Same. Professor Thayer's view.—Professor Thayer, in commenting upon the vagueness of the parol evidence rule, says: "Few thing in our law are darker than this, or fuller of subtle difficulties. It appears to me that the chief reason for it is that most of the questions brought under this rule are out of place; it is true, in a very great degree, that a mass of incongruous matter is here grouped together, and then looked at in a wrong focus. Because the rule deals with evidences, with writings,—things the nature of which it is to be evidence of what they record,—it is assumed that it belongs to the law of evidence. But in truth most of the matters with which it is concerned have nothing to do with the law of evidence. It heightens the confusion, however, to find that some of them belong there."⁴

§ 6. Basis of the rule.—The two chief reasons assigned for the parol evidence rule are uncertainty of memory and danger of falsehood. In an early case Lord Coke assigns as the basis of the

3. Wigmore on Evid., Vol. IV. 3369.

4. 6 Harvard Law Review 325.

rule the uncertainty of "slippery memory."⁵ Another judge assigns as the basis "the treachery of memory and the falsehood of men."⁶ Another judge says "If it were not for the rule no man would be able to protect himself by the most solemn forms and attestations against falsehood, misrepresentation and perjury."⁷ And Shaw, C. J., says, "The rule is founded on the long experience, that written evidence is so much more certain and accurate than that which rests in fleeting memory only, that it would be unsafe, when parties have expressed the terms of their contract in writing, to admit weaker evidence to control and vary the stronger, and to show that the parties intended a different contract from that expressed in the writing signed by them."⁸ Were the rule otherwise, written instruments would be of comparatively little value. Moreover, the temptation to commit perjury would be greatly increased.⁹

In some states there are statutes which expressly provide that parol testimony is inadmissible to vary or contradict the contents of a written instrument; but the rule has existed from early times, independent of statute.¹⁰

5. Rutland's Case, 5 Coke 26.

6. Rearick's Executors v. Rearick, 15 Pa. St. 66, 72.

7. Irvin v. Irvin, 169 Pa. St. 529, 546.

8. Underwood v. Simonds, 12 Metc. (Mass.) 275.

9. Millett v. Marston, 62 Me. 477.

10. Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 Pac. R. 625; Crane v. Bailey, 126 Mich. 323, 85 N. W. R. 874; Pike v. McIntosh, 167 Mass. 309, 45 N. E. R. 749; Boyd v.

According to some decisions the parol evidence rule is based upon the principle that a writing is evidence of a higher order than mere oral testimony.¹¹ In other words, that the rule forms part of the adjective law of evidence exclusively. According to the better view, however, the rule, in a large measure, is part of the substantive law. "Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it (being outside the writing by which the parties have undertaken to be bound) shall not be shown."¹²

§ 7. **Application of the rule.**—The parol evidence rule is an exceedingly flexible one, and is subject to a multitude of exceptions and limitations.¹³ Moreover, the decisions upon some phases of it are in hopeless conflict. "To reconcile the adjudicated cases with each other or with the rule itself, would require great ingenuity, and perhaps be an impossible undertaking."¹⁴

Paul, 125 Mo. 9, 28 S. W. R. 171; *Am. Assoc. v. Innis*, 109 Ky. 595, 60 S. W. R. 388; *Bulkley v. Devine*, 127 Ill. 406, 20 N. E. R. 16, 3 L. R. A. 330; *McEnergy v. McEnergy*, 110 Ia. 718, 80 N. W. R. 1071; *Uihlein v. Mathews*, 172 N. Y. 154, 64 N. E. R. 792.

11. *Wilkinson v. Wilkinson*, 17 N. C. 376; *Ratcliffe v. Allison*, 3 Rand. (Va.) 537.

12. *Pitcairn v. Philip Hiss Co.*, 125 Fed. R. 110, 113, 61 C. C. A. 657.

13. *Bassett v. Glover*, 31 Mo. App. 150.

14. *Kennedy v. Erie, etc., Plank Road Co.*, 25 Pa. St. 224, 225.

The rule is applicable to judicial records;¹⁵ judicial proceedings in general;¹⁶ the docket of a justice of the peace;¹⁷ the record of a probate court;¹⁸ the record of a police court;¹⁹ an assignment of dower;²⁰ an order of a court;²¹ a record of an execution sale;²² a drawing of a jury;²³ the record of a recognizance;²⁴ a stipulation pertaining to a particular suit;²⁵ recitals showing jurisdiction of a court of record;²⁶ legis-

15. *In re Macke*, 31 Kan. 54, 1 Pac. R. 785; *Pennell v. Curd*, 96 Me. 392, 52 Atl. R. 801; *Rubel v. Title Guar., etc., Co.*, 199 Ill. 110, 64 N. E. R. 1033; *State v. Miller*, 95 Ia. 368, 64 N. W. R. 288; *Bent v. Stone*, 184 Mass. 92, 68 N. E. R. 46.
16. *Stuart v. Morrison*, 67 Me. 549 (writ); *Taylor v. Talman*, 2 Root (Conn.) 291 (verdict); *Mandeville v. Bracy*, 31 Miss. 460 (judgment); *Morris v. Hubbard*, 10 S. D. 259, 72 N. W. R. 894 (execution); *Wright-Blodgett Co. v. Elms*, 106 La. 150, 30 So. R. 311 (answer).
17. *May v. Hammond*, 146 Mass. 439, 15 N. E. R. 925; *Sutton v. Cole*, 155 Mo. 206, 55 S. W. R. 1052.
18. *Hankinson v. Charlotte, etc., Ry. Co.*, 41 S. C. 1, 19 S. E. R. 206 (letters of admin.).
19. *Smelzer v. Lockhart*, 97 Ind. 315.
20. *Young v. Gregory*, 46 Me. 475; *Fuller v. Ruse*, 153 Mass. 46, 26 N. E. R. 410.
21. *Boynton v. People*, 155 Ill. 66, 39 N. E. R. 622.
22. *Collins v. Ball*, 82 Tex. 259, 17 W. R. 614, 27 Am. St. Rep. 877; *Pritchard v. Madren*, 31 Kan. 38, 2 Pac. R. 691.
23. *State v. Allen*, 1 Ala. 442.
24. *Watts v. Stevenson*, 169 Mass. 61, 47 N. E. R. 447; *McMicken v. Com.*, 58 Pa. St. 213.
25. *State v. Lefavre*, 53 Mo. 470.
26. *Robinson v. Ferguson*, 78 Ill. 538; *Freeman v. Thompson*, 53 Mo. 183.

lative records;²⁷ printed laws published by authority;²⁸ county records;²⁹ records of a school district;³⁰ records of assessment and collection of taxes;³¹ military records;³² records of a land office;³³ records of official sales of land required by law to be kept;³⁴ a charter party;³⁵ a bond;³⁶ a warranty;³⁷ a will;³⁸ a deed;³⁹ a contract,⁴⁰ etc.

27. *In re* Howard County, 15 Kan. 194; *Wise v. Bigger*, 79 Va. 269.
28. *Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161.
29. *State v. Simmons*, 40 La. Ann. 758, 5 So. 29; *Carroll County v. O'Connor*, 137 Ind. 622, 35 N. E. R. 1006, 37 N. E. R. 16.
30. *Cowley v. Harrisville Tp. Sch. Dist.*, 130 Mich. 634, 90 N. W. R. 680.
31. *Blanchard v. Powers*, 42 Mich. 619, 4 N. W. R. 542; *Gaither v. Green*, 40 La. Ann. 362, 4 So. 210. *Contra*, *State v. Aldridge*, 66 Ohio St. 598, 64 N. E. R. 562.
32. *Fichburg v. Lunenburg*, 102 Mass. 358 (discharge of soldier).
33. *Branson v. Wirth*, 17 Wall. (U. S.) 32, 21 L. ed. 566.
34. *Bays v. Trulson*, 25 Oreg. 109, 35 Pac. R. 26.
35. *Johnson v. D. H. Bibb Lumber Co.*, 140 Cal. 95, 73 Pac. R. 730; *Pitkin v. Brainerd*, 5 Conn. 451, 13 Am. Dec. 79.
36. *Lane v. Price*, 5 Mo. 101; *Gray v. Phillips*, 88 Ga. 199, 14 S. E. R. 205; *Carroll County v. Ruggles*, 69 Ia. 269, 28 N. W. R. 590; 58 Am. Rep. 223.
37. *McQuaid v. Ross*, 77 Wis. 470, 40 N. W. R. 892; *Bradford v. Neil*, 46 Minn. 347, 49 N. W. R. 193.
38. *Decker v. Decker*, 121 Ill. 341, 12 N. E. R. 750; *Willard v. Darrah*, 168 Mo. 660.
39. *Hogan v. Wallace*, 166 Ill. 328; *Blow v. Vaughn*, 105 N. C. 198.
40. *Merrigan v. Hall*, 175 Mass. 508, 56 N. E. R. 605; *Rose v. Lanyon Zinc Co.*, 68 Kan. 126, 74 Pac. R. 625; *Ellis v.*

§ 8. Prior and contemporaneous agreements merge in the document.—Where the contracting parties reduce their final agreement to writing the law presumes that all prior and contemporaneous oral negotiations become merged in the document. “Where parties reduce their contract to writing, the law presumes that the whole terms and conditions of the agreement are fully incorporated in, and become a part of, the written instrument.”⁴¹ “The rule is, where a contract is reduced to writing, that the writing affords the only evidence of the terms and conditions of the contract. All antecedent and contemporaneous verbal agreements are merged in the written contract.”⁴²

§ 9. The rule applicable to the legal import of a document.—The rule is not confined to the express terms of a document. It is applicable also to its legal import.⁴³ Thus, where a written contract for the payment of money is silent as to the time of payment, and by a rule of law it is payable on demand, parol testimony is inadmissible to prove an oral agreement to pay it at a

Conrad Brew. Co., 207 Ill. 291, 69 N. E. R. 808; Williams v. Robinson, 73 Me. 186, 40 Am. Rep. 352.

41. Conwell v. S. & N. W. Ry. Co., 81 Ill. 232, 234.

42. Lane v. Sharpe, 3 Scam. (Ill.) 566, 572. See also, U. N. Bank of Chicago v. L. N. A. & C. Ry. Co., 145 Ill. 208, 221; Graham v. Sadler, 165 Ill. 95, 98.

43. Cliver v. Heil, 95 Wis. 364, 70 N. W. R. 346; Richards v. McKenney, 43 Me. 177; Brown v. Hitchcock, 28 Vt. 452; Fawcner v. Lew Smith Wall Paper Co., 88 Ia. 169, 49 N. W. R. 1003, 55 N. W. R. 200, 45 Am. St. Rep. 230.

different time.⁴⁴ Where a written contract is silent as to the time of performance the law implies that it is to be performed within a reasonable time, depending upon the circumstances of the case, and parol testimony is inadmissible to show an oral agreement to perform it at a different time.⁴⁵ Where a written contract of employment is silent as to compensation a reasonable amount is implied, and parol testimony of an oral agreement fixing a different amount is inadmissible.⁴⁶ Where a written contract obligates a person in general terms to pay a sum of money, parol testimony is inadmissible to prove an oral agreement to pay it out of a particular fund.⁴⁷ Where a written contract of employment is silent as to the length of the term, it may be terminated at any time by either party, and parol testimony is inadmissible to prove an oral agreement to the contrary.⁴⁸ Again, where two mortgages secure installments of the same debt, and by legal import priority is given to the installment first due in applying the proceeds from a sale of the property under foreclosure pro-

44. *Thompson v. Phelan*, 22 N. H. 339; *Warren v. Wheeler*, 8 Metc. (Mass.) 97.

45. *Driver v. Ford*, 90 Ill. 595; *Self v. King*, 28 Tex. 552; *Boehm v. Lies*, 60 N. Y. 436; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147, 30 Am. St. Rep. 421.

46. *Williams v. Kansas City Sub. Belt Ry. Co.*, 85 Mo. App. 103.

47. *Murchie v. Peck*, 160 Ill. 175; *Mumford v. Tolman*, 157 Ill. 258.

48. *Irish v. Dean*, 39 Wis. 562.

ceedings, parol testimony is not admissible to prove an oral agreement that the proceeds should be applied differently.⁴⁹

§ 10. **Application of the rule to various classes of contracts.**—The parol evidence rule is applied to contracts much more frequently than to any other class of documents.⁵⁰ The rule does not apply, however, to incomplete written contracts.⁵¹ Thus, it has been held that it does not apply to a mere written acknowledgment of a sum due;⁵² to an indorsement on an envelope, containing securities as collateral, where it states the names of the borrower and the lender, the list of securities, the amount of the loan, the time and rate of interest;⁵³ to a receipt for part payment of the agreed price of certain work;⁵⁴ to a check for the amount of a bank deposit;⁵⁵ to a memorandum stating "Bought of G. Pink, a horse for the sum of £7 2s. 6d." and signed "G.

49. *Isett v. Dean*, 39 Wis. 562.

50. *Bullard v. Brewer*, 118 Ga. 918, 45 S. E. R. 711; *Rose v. Lanyon Zinc Co.*, 68 Kan. 126, 74 Pac. R. 625; *Merrigan v. Hall*, 175 Mass. 508, 56 N. E. R. 605; *Boyd v. Paul*, 125 Mo. 9, 28 S. W. R. 171; *Tripp v. Smith*, 168 N. Y. 655, 61 N. E. R. 1135; *Irwin v. Irwin*, 169 Pa. St. 529, 32 Atl. R. 445, 29 L. R. A. 292; *Watson v. Miller*, 82 Tex. 279, 17 S. W. R. 1053; *DeWitt v. Berry*, 134 U. S. 306.

51. *Holt v. Pie*, 120 Pa. St. 425, 14 Atl. R. 389; *Smith v. Coleman*, 77 Wis. 343, 46 N. W. R. 664.

52. *Alexander v. Thompson*, 42 Minn. 498, 44 N. W. R. 534.

53. *Union Trust Co. v. Whitorn*, 97 N. Y. 172.

54. *Flood v. Joiner*, 96 Ind. 459.

55. *Rislevy v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421.

Pink;''⁵⁶ to an indorsement and delivery of a bill of lading;⁵⁷ or to a writing which states only part of an entire verbal contract.⁵⁸

The rule is applicable to a bill of lading;⁵⁹ to a written agreement of guaranty or suretyship;⁶⁰ to a contract of indemnity;⁶¹ to an application for insurance;⁶² to a policy of insurance;⁶³ to a contract of partnership;⁶⁴ to a contract of employment;⁶⁵ to a contract of sale;⁶⁶ to a contract

56. *Allen v. Pink*, 4 M. & W. 140.

57. *Security Bank v. Luttgen*, 29 Minn. 363, 13 N. W. R. 151.

58. *Chapin et al. v. Dobson*, 78 N. Y. 74; *Grierson v. Mason*, 60 N. Y. 394; *Potter v. Hopkins*, 25 Wend. (N. Y.) 417; *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Jeffery v. Walton*, 1 Stark. Rep. 385.

59. *Cohen v. Jacoboice*, 101 Mich. 409, 59 N. W. R. 665; *Tallahassee Falls Mfg. Co. v. Western Ry. Co.*, 117 Ala. 520, 23 So. R. 139, 67 Am. St. Rep. 179.

60. *Trentman v. Hetcher*, 100 Ind. 105; *Boston, etc., Glass Co. v. Moore*, 119 Mass. 435; *Squier v. Evans*, 127 Mo. 514, 30 S. W. R. 143; *Adams v. Wallace*, 119 Cal. 67, 51 Pac. R. 14.

61. *Jones v. Wolcot*, 2 Allen (Mass.) 247; *Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. R. 881.

62. *Dow v. Whetten*, 8 Wend. (N. Y.) 160.

63. *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151; *Union Cent. L. Ins. Co. v. Hook*, 62 Ohio St. 256, 56 N. E. R. 906; *Hartford F. Ins. Co. v. Webster*, 69 Ill. 392; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544.

64. *Mich. Sav. Bank v. Butler*, 98 Mich. 381, 57 N. W. R. 253; *Taft v. Schwamb*, 80 Ill. 289; *Miller v. Butterfield*, 79 Cal. 62, 21 Pac. R. 543.

65. *Alvord v. Cook*, 174 Mass. 120, 54 N. E. R. 499 (broker); *Stowell v. Greenwich Ins. Co.*, 163 N. Y. 298, 57 N. E. R. 480 (insur. agent); *Violette v. Rice*, 173 Mass. 82, 53 N. E. R. 144 (actress); *Drennan v. Satterfield*, 119 Ala. 84,

of subscription;⁶⁷ to an acceptance of a draft;⁶⁸ to a promissory note;⁶⁹ to an indorsement of a note in blank;⁷⁰ to a certificate of deposit;⁷¹ to

24 So. R. 723; *Dickson v. Hartman Mfg. Co.*, 179 Pa. St. 343, 36 Atl. R. 246 (no time stated).

66. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S. E. R. 980; *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582; *Smith v. Barber*, 153 Ind. 322, 53 N. E. R. 1014; *Tripp v. Smith*, 180 Mass. 122, 61 N. E. R. 804; *Welch's Succession*, 111 La. 801, 35 So. R. 913, 64 L. R. A. 823; *Dady v. Rourke*, 172 N. Y. 447, 65 N. E. R. 273 (description of prop.); *Ohlert v. Alderson*, 86 Wis. 433, 57 N. W. R. (quantity of land); *Schreiber v. Butler*, 84 Ind. 576 (quantity of ice); *McLeod v. Hunt*, 128 Mich. 124, 87 N. W. R. 101 (price); *Hunt v. Gray*, 76 Ia. 268, 41 N. W. R. 14 (time and mode of payment); *Long v. Millerton Iron Co.*, 101 N. Y. 638, 4 N. E. R. 735 (reservation); *Ehrsam v. Brown*, 64 Kan. 466, 67 Pac. R. 867 (warranty of thing sold); *Ferguson v. Arthur*, 128 Mich. 297, 87 N. W. R. 259 (time essence of contract); *Lawrence v. McGuire*, 21 Kan. 552 (time of delivery).
67. *Montpelier M. E. Church v. Town*, 49 Vt. 29 (mode of payment—in work); *Burch v. Augusta, etc., Ry. Co.*, 80 Ga. 296, 4 S. E. R. 850 (written promise to donate right of way and oral agreement as to location of railroad); *Stillings v. Timmins*, 152 Mass. 147, 25 N. E. R. 50; *Low v. Studabaker*, 110 Ind. 57, 10 N. E. R. 301 (oral condition); *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. R. 680, 6 Am. St. Rep. 539.
68. *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146 (oral agreement that acceptor should not be required to pay it).
69. *Phillips v. Jarvis*, 19 Wis. 204 (to be considered a mere receipt).
70. *Martin v. Cole*, 104 U. S. 30 (to be without recourse).
71. *Reed v. Bank of Attica*, 124 N. Y. 671 (that it should draw interest).

a contract fixing no time of payment;⁷² to a contract of sale;⁷³ to an indemnity bond,⁷⁴ etc.

§ 11. Application of the rule to deeds, mortgages and leases.—The parol evidence rule has been frequently applied to deeds, mortgages and leases as regards the descriptions of the parties, the description of the subject matter, the nature and extent of the estate demised, and the covenants, reservations and limitations therein contained. Thus, parol testimony has been held inadmissible to show that a person other than the one described in the deed as grantee was the person intended;⁷⁵ that the premises demised were different from those described in the document;⁷⁶ that the quantity of land demised was more or less than that described in the instru-

72. *Ford v. Yates*, 2 Man. & 549 (to show credit was given).

73. *Allen v. Bryson*, 67 Ia. 591 (to show it was a contract of bailment); *Baker v. Higgins*, 21 N. Y. 397 (to show a delivery in parcels at different times instead of in gross as stated in the writing); *Snyder v. Koons*, 20 Ind. 389 (to show that seller was to loan the buyer the purchase price); *Osborn v. Hendrickson*, 7 Cal. 282 (to show that articles not stated in writing were included); *Daly v. Kimball*, 67 Ia. 132 (to show that an oral condition was to apply to the writing).

74. *Cowel v. Anderson*, 33 Minn. 374 (to show that the obligor was not to be called upon to meet the obligation).

75. *Pitts v. Brown*, 49 Vt. 86, 24 Am. Rep. 114; *Jackson v. Hart*, 12 Johns. (N. Y.) 77, 7 Am. Dec. 280.

76. *Stowell v. Buswell*, 135 Mass. 340; *Weill v. Lucerne Min. Co.*, 11 Nev. 200; *Elliott v. Weed*, 44 Conn. 19; *Porter v. Reid*, 81 Ind. 569.

ment;⁷⁷ that a grant of a right of way was different from that described in the deed;⁷⁸ that the land conveyed was in a different location from that described in the deed;⁷⁹ that a tax deed was of no effect because the manner of listing and assessing the property as described in the deed was different from that required by law,⁸⁰ or because the land was sold for taxes of a different year from that described in the deed;⁸¹ that the word "heirs" in the deed was intended by the parties to the instrument to mean "children";⁸² that a plan expressly referred to in the deed did not correctly describe the premises conveyed;⁸³ that the boundaries of the land conveyed were different from those expressed in the deed;⁸⁴ that a particular tract of land, not alluded to in the deed, was to be included in the grant, or that a particular tract described in the deed was to be excluded from the grant;⁸⁵ that the grantee was

77. *Turner v. Rives*, 75 Ga. 606; *Bladen v. Wells*, 30 Md. 577; *Child v. Wells*, 13 Pick. (Mass.) 121.

78. *Comstock v. Van Deusen*, 5 Pick. (Mass.) 163.

79. *Elofrson v. Lindsay*, 90 Wis. 203, 63 N. W. R. 89.

80. *Easton v. Perry*, 37 Ia. 681.

81. *Bower v. Chess, etc., Co.*, 83 Miss. 218, 35 So. R. 444.

82. *Pritchard v. James*, 93 Ky. 306, 20 S. W. R. 216, 14 Ky. L. Rep. 243.

83. *Purchase v. Tiffany*, 1 Me. 219, 10 Am. Dec. 60; *Renwick v. Renwick*, 9 Rich. (S. C.) 50.

84. *Fuller v. Weaver*, 175 Pa. St. 182, 34 Atl. R. 634; *Sleeper v. Laconia*, 60 N. H. 201, 49 Am. Rep. 311; *Drew v. Swift*, 46 N. Y. 204.

85. *Adams v. Marshall*, 138 Mass. 228, 52 Am. Rep. 271;

subsequently to reconvey the land;⁸⁶ that a line described in the deed as a *straight* line was intended to mean a *curved* line;⁸⁷ that the grantees of a tract of land, who were described in the deed as husband and wife, took a tenacy in common and not a tenancy by the entirety;⁸⁸ that a quit claim deed was intended to be a warranty deed;⁸⁹ that the grantor was to pay certain taxes expressly excepted in the deed from an express warranty;⁹⁰ that a party to the deed orally covenanted to do a certain thing not expressly described in the deed, or not to do a certain thing which he expressly covenanted in the deed to do;⁹¹ that the grantor was to retain possession of the land until the purchase price was paid,⁹² or for life,⁹³ or for a definite time,⁹⁴ or until the next crop was harvested,⁹⁵ or until the youngest

Thayer v. Finton, 108 N. Y. 397; Griffin v. Hall, 115 Ala. 482, 22 So. R. 162.

86. Bonham v. Craig, 80 N. C. 224.

87. Pitts v. Brown, 49 Vt. 86, 24 Am. Rep. 114; Allen v. Kingsbury, 16 Pick. (Mass.) 235.

88. Jacobs v. Miller, 50 Mich. 119, 15 N. W. R. 42.

89. Cartier v. Douville, 98 Mich. 22, 56 N. W. R. 1045.

90. MacLeod v. Skiles, 81 Mo. 595, 51 Am. Rep. 254.

91. Garrett v. Weinberg, 54 S. C. 127, 31 S. E. R. 341, 34 S. E. R. 70; Powers v. Spaulding, 96 Wis. 487, 71 N. W. R. 891; Miller v. Desverges, 75 Ga. 407.

92. Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41, 21 Pac. R. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

93. Woodward v. Foster, 64 Hun (N. Y.) 147.

94. Carr v. Hays, 110 Ind. 408, 11 N. E. R. 25.

95. Melton v. Watkins, 24 Ala. 433, 60 Am. Dec. 481. But see, Willis v. Hulburt, 117 Mass. 151.

grantee became of age;⁹⁶ that the passing of the title to the land was to take effect on a future date;⁹⁷ that certain growing crops were reserved to the grantor;⁹⁸ that there was an oral reservation of rent;⁹⁹ that the grantee would pay an assessment for improvements;¹⁰⁰ that certain known incumbrances were to be excluded from the operation of a general covenant against incumbrances;¹ that a reservation of "standing wood" was intended to mean wood suitable for fuel;² that certain buildings on the land conveyed,³ or certain other fixtures,⁴ or plants, trees or shrubbery,⁵ were orally reserved by the grantor; that in case the lessee purchased the demised

96. *Ford v. Bone*, 32 Tex. Civ. App. 550, 75 S. W. R. 353.

97. *Wallace v. Berdell*, 97 N. Y. 13; *Wright v. Graves*, 80 Ala. 416.

98. *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *McIlvaine v. Harris*, 20 Mo. 457, 64 Am. Dec. 196. (probably weight of authority). *Contra*. *Harvey v. Million*, 67 Ind. 90; *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 588; *Simanek v. Nemetz*, 120 Wis. 42, 97 N. W. R. 508; *Adams v. Watkins*, 103 Mich. 431, 61 N. W. R. 774.

99. *Winn v. Murehead*, 52 Ia. 64.

100. *Desmond v. McNamara*, 107 Wis. 126, 82 N. W. R. 701; *Flynn v. Bourneof*, 143 Mass. 277, 58 Am. Rep. 135.

1. *Bever v. North*, 107 Ind. 544; *Johnson v. Walter*, 60 Ia. 315.

2. *Strout v. Harper*, 72 Me. 270.

3. *Smith v. Odom*, 63 Ga. 499.

4. *Bond v. Coke*, 71 N. C. 97; *Noble v. Bosworth*, 19 Pick. (Mass.) 314.

5. *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592.

premises the rent was to be applied as part of the purchase price;⁶ that the lessor orally agreed that the premises might be used for purposes other than those stated in the lease;⁷ that the lessor orally agreed to furnish water, heat, etc.,⁸ or certain furniture;⁹ that the tenant might remove, after the expiration of his term, certain fixtures erected by him on the premises;¹⁰ that it was orally agreed that certain repairs would be made;¹¹ that the land would be ditched,¹² that certain railroad tracks would be laid to the premises demised,¹³ or that water and gas accommodations would be supplied;¹⁴ that the lessee might surrender the premises upon the happening of a certain contingency, or at his pleasure;¹⁵ that the lease would expire upon a sale of the premises demised;¹⁶ that the lessor orally agreed to accept part of the rent in board;¹⁷ that the

6. *Brann v. Wis. Rendering Co.*, 92 Wis. 245, 66 N. W. R. 196.

7. *Sientes v. Odier*, 17 La. Ann. 153.

8. *Cooney v. Murray*, 45 Ill. App. 463.

9. *Wilson v. Deen*, 74 N. Y. 531.

10. *Stephens v. Ely*, 162 N. Y. 79, 56 N. E. R. 499.

11. *York v. Steward*, 21 Mont. 515, 55 Pac. R. 29, 43 L. R. A. 125; *Kline v. McLain*, 33 W. Va. 32, 10 S. E. R. 11, 5 L. R. A. 400.

12. *Diven v. Johnson*, 117 Ind. 512, 20 N. E. R. 428, 3 L. R. A. 308.

13. *Tracy v. Union Iron Works*, 104 Mo. 193, 16 S. W. R. 203.

14. *McLean v. Nicol*, 43 Minn. 169, 45 N. W. R. 15.

15. *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. R. 544.

16. *Randolph v. Helps*, 9 Colo. 29, 10 Pac. R. 245.

17. *Stull v. Thompson*, 154 Pa. St. 43, 25 Atl. R. 890.

premises were to be occupied and used by the lessee himself, where the lease was silent upon this point;¹⁸ that the liability of an indorser of a note was to be different from the ordinary liability of an indorser;¹⁹ that a conveyance of lands by a father to his child was intended to operate as a resulting trust to himself;²⁰ that an absolute conveyance was intended as a conditional one;²¹ that the lessee was not to sublet the premises for use as a saloon, where the lease expressly authorized him to sublet for "business purposes;"²² that a mortgage was intended as an absolute conveyance,²³ or a conditional sale,²⁴ or an assignment;²⁵ that lands purchased by the husband, where his wife was made the grantee, were held by her in trust for him;²⁶ that the written subscription of a stockholder was conditional,²⁷ etc. On the other hand, there are many cases in which the courts have held that the parol evidence rule does not apply.

18. *Nave v. Berry*, 22 Ala. 382.

19. *Doolittle v. Perry*, 20 Kan. 230; *Charles v. Denio*, 42 Wis. 56.

20. *Annis v. Wilson*, 15 Colo. 236.

21. *Thomas v. Scutt*, 127 N. Y. 133; *Peagler v. Stabler*, 91 Ala. 308.

22. *Harrison v. Howe*, 109 Mich. 476, 67 N. W. R. 527.

23. *Goon Gan v. Richardson*, 16 Wash. 373, 47 Pac. R. 762.

24. *Wing v. Cooper*, 37 Vt. 169.

25. *Dunham v. McNatt*, 15 Tex. Civ. App. 552, 39 S. W. R. 1016.

26. *Montgomery v. Craig*, 128 Ind. 48.

27. *Masonic Temple Assoc. v. Channel*, 43 Minn. 353.

§ 12. **Exceptions and limitations.**—The parol evidence rule has many exceptions and limitations. As to some of them the decisions are in hopeless conflict, but as to most of them they are harmonious. The following sections of this chapter deal almost exclusively with these exceptions and limitations.

§ 13. **Incomplete writings.**—As stated in § 9, the parol evidence rule does not apply to incomplete documents. It has been said that a contract cannot rest partly in writing and partly in parol.²⁸ While this statement is somewhat vague, what probably is meant is that where a contract is partly oral and partly in writing the whole is treated as parol. "Where a contract in writing shows upon its face that it is not the whole contract between the parties, and does not purport to be a complete agreement, parol evidence is admissible to show what was the whole contract, and the same then becomes all parol."²⁹

As to the evidence allowable in determining whether a given writing is complete or not the courts are not harmonious. Some hold that it is confined to the writing itself. "The only safe criterion of the completeness of a written contract as the full expression of the terms of the

28. *Hartford F. Ins. Co. v. Webster*, 69 Ill. 392, 393; *Longfellow v. Moore*, 102 Ill. 289, 294.

29. *Selig v. Rehfuß*, 195 Pa. St. 200, 206. See also, *Schwab v. Ginkinger*, 181 Pa. St. 8, 14; *Ebert v. Arends*, 190 Ill. 221.

parties' agreement is the contract itself."³⁰ Others hold that testimony of the surrounding circumstances is also admissible. "While the writing itself is the only criterion by which the intention of the parties is to be ascertained, yet it is not necessary that the incompleteness of the writing should appear on its face from a mere inspection of it, for it is to be construed in the light of its subject-matter and the purposes for which it was executed."³¹ The latter view is in accord with the general rule.³²

To prove the oral parts of incomplete written contracts parol evidence has been held admissible to show the compensation orally agreed to be paid for performing certain services;³³ to show the location of timber agreed to be cut;³⁴ to show that a sale of goods was by sample;³⁵ to show the time when goods were to be delivered;³⁶ to show the oral part of the contract that the landlord was to receive less rent for the premises during the time they were undergoing

30. *Naumberg v. Young*, 44 N. J. L. 331. See also, *Telluride Power Trans. Co. v. Crane Co.*, 208 Ill. 218, 10 N. E. R. 319; *Union Selling Co. v. Jones*, 128 Fed. R. 672.

31. *Potter v. Easton*, 82 Minn. 247.

32. *Peabody v. Bement*, 79 Mich. 47; *Burton v. Morrow*, 133 Ind. 221; *Ebert v. Arends*, *supra*; *Fawcner v. Smith Wall Paper Co.*, 88 Ia. 169; *Thomas v. Scutt*, 127 N. Y. 133, 138.

33. *Sayre v. Wilson*, 86 Ala. 151.

34. *Pinney v. Thompson*, 3 Ia. 74.

35. *Routledge v. Worthington Co.*, 119 N. Y. 592; *Smith v. Coleman*, 77 Wis. 343.

repairs;³⁷ to show the amount of goods agreed to be delivered;³⁸ to show an oral acceptance of an offer in writing,³⁹ etc.

Where the contract is partly oral and partly in writing the parol evidence of the oral part must be consistent with the written part.⁴⁰ Where the writing states the terms and conditions of the contract as regards only one of the parties to it parol evidence is admissible to show the oral terms and conditions as regards the other party.⁴¹ Where the writing does not show on its face that it was intended to express the whole contract parol evidence is admissible to show the oral part.⁴² As said by Mr. Stephen, parol evidence is admissible to show "the existence of any separate, oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them."⁴³

36. *Johnson v. McRary*, 5 Jones (N. C.) 369.

37. *Condit v. Condrey*, 123 N. Y. 463; *Roberts v. Bonaparte*, 73 Md. 191.

38. *Potter v. Hopkins*, 25 Wend. (N. Y.) 417; *Norton v. Woodruff*, 2 N. Y. 153.

39. *Pacific Works v. Newhall*, 34 Conn. 67.

40. *Radigan v. Johnson*, 174 Mass. 68; *Gardner v. Mathews*, 81 Mo. 627; *Horn v. Hanson*, 56 Minn. 46.

41. *Dana v. Taylor*, 150 Mass. 25; *Smith v. Coleman*, 77 Wis. 343.

42. *Chapin et al. v. Dobson*, 78 N. Y. 74 (a leading case); *Allen v. Pink*, 4 M. & W. 140.

§ 14. **Collateral agreements.**—The parol evidence rule does not apply to independent collateral contracts.⁴⁴ Thus, it has been held that parol evidence is admissible, in the case of a written contract for the hire of a horse, to prove an oral agreement that accidents occasioned by the horse shying should be at the risk of the hirer;⁴⁵ to show an oral agreement that an indebtedness, evidenced by a writing, should be paid or discharged in a particular way;⁴⁶ to show, in an action on a promissory note given for wood on the plaintiff's land, an oral agreement, made at the same time, that if anything happened to the wood thru his means or by setting fire to his fallow, he would bear the loss (the fallow was burned and also the wood);⁴⁷ to show, in an action for breach, an oral agreement by the lessor (deft.) that he would kill off the rabbits on the lands demised if the lessee would renew the lease for another term;⁴⁸ to show, in an action

43. Steph. Dig. of Evid., art. 90. See also, *Hope v. Balen*, 58 N. Y. 380.

44. *Snowden v. Guion*, 101 N. Y. 458, 462; *McDonald v. Danaly*, 196 Ill. 133, 63 N. E. R. 648; *Drake v. Allen*, 179 Mass. 197, 60 N. E. R. 477; *Mann v. Taylor*, 78 Ia. 355, 43 N. W. R. 220; *Saxton v. Pells*, 98 Mich. 340, 57 N. W. R. 169; *Brown v. Beecher*, 120 Pa. St. 590, 15 Atl. R. 608; *Stokes v. Polley*, 164 N. Y. 266, 58 N. E. R. 133; *Louisville, etc., Ry. Co. v. Duncan*, 137 Ala. 446, 34 So. 988.

45. *Jeffry v. Walton*, 1 Stark. Rep. 385.

46. *Honeycut v. Strother*, 2 Ala. 135.

47. *Bättermann v. Pierce*, 3 Hill (N. Y.) 171.

48. *Morgan v. Griffith*, L. R. 6 Exch. 70.

on a promissory note, an oral agreement by an indorser, between him and the indorsee, to waive demand and notice;⁴⁹ to show, in a written contract for the sale of lands, an oral agreement as to the mode of paying for the land;⁵⁰ to show, in an action by the grantee of a lot against the grantor, an oral promise by the grantor to grade and construct a street so as to connect with a certain public street already built and open, and also to cause the city water to be put into the street by a certain specified time;⁵¹ to show, in an action against the grantor, an oral agreement by him to pay for the filling of a lot sold by him to the grantee;⁵² to show, in an action for damages for breach of a contract, an oral agreement by the vendor of a stock of goods not to engage in competition with the vendee;⁵³ to show, in an action against a manufacturer of goods, who had accepted a written order, with stipulations as to quality, price, etc., an oral agreement to advertise the goods;⁵⁴ to show, in an action on a note, an oral agreement between all parties to the note that demand of payment should be made at

49. *Sanborn v. Southerd*, 25 Me. 409, 43 Am. Dec. 288.

50. *Paul v. Owings*, 32 Md. 402; *Sivers v. Sivers*, 97 Cal. 518.

51. *Durkin v. Cobleigh*, 156 Mass. 108.

52. *McCormick v. Cheevers*, 124 Mass. 262.

53. *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Fusting v. Sullivan*, 41 Md. 162. *Contra*. *Costello v. Eddy*, 128 N. Y. 650; *Smith v. Gibbs*, 44 N. H. 335.

54. *Ayer v. Manuf. Co.*, 147 Mass. 46, 16 N. E. R. 754. See also, *Willis v. Hulbert*, 117 Mass. 151; *Rennell v. Kimball*, 5 Allen (Mass.) 356.

a particular bank;⁵⁵ to show an oral agreement, by the grantor of a tract of land, to pay for building a sewer in the street adjoining the land sold;⁵⁶ to show an oral agreement by a landlord to make certain repairs before the beginning of the term;⁵⁷ to show an oral agreement relating to transportation by a common carrier notwithstanding the giving of a printed ticket;⁵⁸ to show, as between an indorser and his immediate indorsee, an oral agreement to waive demand and notice of non-payment;⁵⁹ to show an oral understanding that a promissory note in form, executed by a daughter and made payable to her father was intended only as a mere memorandum or receipt of an advancement;⁶⁰ to show an oral agreement that certain notes were not to be paid until sufficient profits accumulated from a corporate business to meet them;⁶¹ to show an oral agreement between two indorsers of a note as to the mode of adjusting their losses •

55. *Brent's Exec. v. Bank of the Metropolis*, 1 Pet. (U. S.) 89.

56. *Carr v. Dooley*, 119 Mass. 294. See also, *Graffam v. Pierce*, 143 Mass. 386, 9 N. E. R. 819; *Cole v. Hadley*, 162 Mass. 579.

57. *Clenighan v. McFarland*, 34 N. Y. State Rep. 624; *Mann v. Nunn*, 43 L. J. (C. P.) 241.

58. *Van Buskirk v. Roberts*, 31 N. Y. 661.

59. *Dye v. Scott*, 35 Ohio St. 194, 35 Am. Rep. 604.

60. *Brook v. Latimer*, 44 Kan. 431.

61. *Carraher v. Mulligan*, 54 Hun (N. Y.) 638, 28 N. Y. State Rep. 439.

in case any arose;⁶² to show an oral agreement between the payee of a note and the indorsers that the latter were not to be personally liable;⁶³ to show, in an action by a lessee against the lessor for damages for breach of a covenant to repair, an oral understanding that the lessee intended to use the premises for a particular purpose, which purpose caused the damages to be greater than they would have been under ordinary circumstances;⁶⁴ to show, as between the immediate parties, an oral understanding that an *irregular* indorser was to be liable as a guarantor,⁶⁵ a surety or a joint maker,⁶⁶ or as an indorser;⁶⁷ to show, as between the immediate parties, an oral agreement that the mortgagor of certain chattels might keep possession of them;⁶⁸ to show an oral agreement which induced a party to a written contract to make it;⁶⁹ to show that an indorsement was made without consideration and solely for the accommodation of the indorsee;⁷⁰ to explain an ambiguity in an indorsement,

62. *Phillips v. Preston*, 5 How. (U. S.) 278.

63. *Kingsland v. Koepp*, 35 Ill. App. 81.

64. *Dempsey v. Hertzfield*, 30 Ga. 866. See also, *Hopkins v. Watts*, 27 Ga. 490.

65. *Seymour v. Farrell*, 51 Mo. 95; *Worden v. Salter*, 90 Ill. 160; *Eilbert v. Finkbeiner*, 68 Pa. St. 243.

66. *Baker v. Robinson*, 63 N. C. 191; *Walz v. Alback*, 37 Md. 404.

67. *Truman v. Bishop*, 83 Ia. 697.

68. *Pierce v. Stevens*, 30 Me. 184.

69. *Ferguson v. Rafferty*, 128 Pa. St. 337.

70. *Wood v. Mathews*, 73 Mo. 477; *Breneman v. Furniss*, 90 Pa. St. 186; *Lovejoy v. Citizens' Bank*, 23 Kan. 331.

even against a purchaser before maturity for value;⁷¹ to show who was meant by the term "you", when used to represent the payee of a note;⁷² or to show that the name of a principal was signed to a contract by his authorized agent;⁷³ to show, in an action of assumpsit to recover for driving a boom of poplar logs from one place to another, at a certain price per cord, an oral agreement that the logs should be scaled by a scaler to be sent by the owner of the land upon which the logs were cut, and that this scale should control.⁷⁴

On the other hand, parol testimony has been held inadmissible to show, in an action on a guaranty as to the amount of fuel saved by using a certain kind of furnace, an oral agreement as to the kind of test that was to be used;⁷⁵ to show, in an action against an agent on a promissory note, where he had signed only his own name as maker, that he intended to bind his principal and not himself;⁷⁶ to show that a *regular* indorser intended to bind himself as guarantor, or in any capacity other than that of indorser;⁷⁷ or to show

71. Thacher v. Stevens, 46 Conn. 561; Good v. Martin, 95 U. S. 95.

72. Shackelford v. Hooker, 54 Miss. 716.

73. Odd Fellows v. First Nat. Bank, 42 Mich. 463; First Nat. Bank v. Gay, 63 Mo. 33.

74. Gould v. Boston Excelsior Co., 91 Me. 214.

75. Hawley Down-Draft Furnace Co. v. Hooper, 90 Md. 390, 45 Atl. R. 456; Exhaust Ventilator Co. v. Chicago, M. & St. P. Ry. Co., 69 Wis. 454, 34 N. W. R. 509; Seitz v. Machine Co., 141, U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837.

an oral agreement that the sum stipulated in writing to be paid for a one-third interest in a hotel was to be paid out of the profits of the business.⁷⁸

§ 15. Same. Subject matter of oral agreement separate and distinct.—Where the subject matter of the oral agreement is separate and distinct from that of the written contract parol evidence of the oral agreement is always admissible. Thus, where the parties to a contract negotiated for the sale and purchase of the fixtures and good-will of a business, and their agreement on that subject was reduced to writing, and at the same time a promise was made by the defendant in consideration of the plaintiff's signing the agreement, that he, the defendant, would settle an action then pending against the plaintiff at the suit of a third party, and he failed to do so, parol evidence was admissible, in an action for damages for the breach, to prove the oral agreement.⁷⁹ The ruling in this case was expressly based upon the fact that the defendant's promise to settle the action against the plaintiff pertained to a subject matter wholly collateral and distinct from that of the sale and purchase.

76. *Poole v. Rice*, 9 W. Va. 73; *Arnold v. Stackpole*, 11 Mass. 27; *Hypes v. Griffin*, 89 Ill. 134.

77. *Finley v. Green*, 85 Ill. 536; *Hamburger v. Miller*, 48 Md. 327.

78. *Smith v. Kemp*, 92 Mich. 357. See also, *Dawson v. Bristol*, 97 Ga. 408.

79. *Lindley v. Lacey*, 17 C. B. (N. S.) 578. See also, *Dutton v. Garrish*, 9 Cush. (Mass.) 89.

§ 16. **Same. Oral warranties excluded.**—While a warranty of the quality of the property sold is collateral to the sale, yet, when such an undertaking is entered into it becomes part of the contract by the agreement of the parties;⁸⁰ and when the contract is reduced to writing parol evidence is inadmissible to add a contract of warranty to the terms of the contract as expressed in the writing.⁸¹ Thus, in an action upon a written contract for the sale of machinery parol testimony is inadmissible to prove a contemporaneous oral warranty.⁸² The rule is also applicable to leases. Thus, where the lessor of buildings and machinery orally warranted that the engine and boiler on the premises demised were in thorough repair, and would furnish all the steam and power necessary to carry on the business for which the lessees desired to use the same, in an action for damages for breach of the warranty parol evidence was held inadmissible to prove it, on the ground that all negotiations relating to the subject matter of the contract were concluded by the written lease.⁸³ And, in an action for the purchase price of logs sold, where the con-

80. *Benj. on Sales* 452.

81. *Frost v. Blanchard*, 97 Mass. 155; *Most v. Pierce*, 58 Ia. 579; *Ethridge v. Balin*, 72 N. C. 213; *Powell v. Edmunds*, 12 East, 6.

82. *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147; *McMullin v. Carson*, 48 Kan. 263; *Amer. Elec. Constr. Co. v. Consumers' Gas Co.*, 47 Fed. R. 43; *Harnor v. Groves*, 15 C. B. 667.

83. *Naumberg v. Young*, 44 N. J. L. 331.

tract of sale had been reduced to writing and the vendor had orally warranted the quality of the logs, the supreme court held that the trial court erred in admitting against objection parol testimony of the oral warranty. In this case Mitchell, J., says: "The written agreement in the case at bar, as it appears on its face, in connection with the law controlling its construction and operation, purports to be a complete expression of the whole agreement of the parties as to the sale and purchase of these logs, solemnly executed by both parties. . . . Parol evidence of extrinsic facts and circumstances would, if necessary, be admissible, as it always is, to apply the contract to its subject-matter, or in order to a more perfect understanding of its language. But in that case such evidence is used, not to contradict or vary the written instrument, but to aid, uphold, and enforce it as it stands. . . . To justify the admission of a parol promise by one of the parties to a written contract, on the ground that it is collateral, the promise must relate to a subject distinct from that to which the writing relates."⁸⁴

It may be well to observe that in some states the courts have held a contrary view to that stated above. But this contrary view is erroneous on principle and opposed by the great weight of authority.

§ 17. **Custom and usage.**—A custom is an un-

84. *Thompson v. Libby*, 34 Minn. 374.

written law established by long usage.⁸⁵ It has been defined as "unwritten law, established by common consent and uniform practice, from time immemorial."⁸⁶ "Something which has, by its universality and antiquity, acquired the force and effect of law in a particular place or country, in respect to the subject-matter to which it relates."⁸⁷ "It is a usage which has acquired the force of law."⁸⁸

§ 18. **Custom and usage distinguished.**—The terms "custom" and "usage" are not synonymous. The former is a *law*; while the latter is only a *fact*. A usage may exist independently of any custom; but a custom owes its existence to usage. Immemorial usage gives birth to custom.⁸⁹ A usage may continue but a short time; while a custom, to exist at all, must be the result of immemorial usage. It is to be observed, however, that it is common practice to use these two terms indiscriminately.

§ 19. **Application of parol evidence rule to custom and usage.**—The parties to an agreement are presumed to have contracted in conformity

85. *Nelson v. So. Pac. Co.*, 15 Utah 325, 331, 49 Pac. R. 644; *Currie v. Syndicate*, 104 Ill. App. 165, 169; *Wilcox v. Wood*, 9 Wend. (N. Y.) 346, 349.

86. *Lindsay v. Cusimano*, 12 Fed. R. 504, 506.

87. *Morningstar v. Cunningham*, 110 Ind. 328, 334, 11 N. E. R. 593, 59 Am. Rep. 211.

88. *Walls v. Bailey*, 49 N. Y. 464, 471, 10 Am. Rep. 407.

89. *Esriche Dict. Juris.*; *Cutter v. Waddingham*, 22 Mo. 206, 284; *Adams v. Pittsburg Ins. Co.*, 76 Pa. St. 411, 414.

with well known and well established customs or usages.⁹⁰ As said by Coleridge, J., "In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten."⁹¹

§ 20. A custom or usage of trade must be certain and uniform.—As previously stated, it is common practice to use the terms "custom" and "usage" interchangeably; and this practice is followed in subsequent discussions in this chapter involving these terms.

A custom or usage of trade, to form a tacit part of a contract, must be certain and uniform.⁹² As said by Lord Ellenborough, "a custom, however ancient, must not be indefinite and uncertain."⁹³ Thus, while a custom of paying two-pence an acre in lieu of tithes would be binding a custom of paying sometimes two pence and

90. *DeWitt v. Berry*, 134 U. S. 306.

91. *Brown v. Byrne*, 3 E. & B. 703.

92. *Johnson v. Parrott*, 92 Mo. App. 199; *Linsley v. Lovely*, 26 Vt. 123; *Hinton v. Coleman*, 45 Wis. 165; *Hursh v. North*, 40 Pa. St. 241.

93. *Wilson v. Willes*, 7 East 121, 3 Smith K. B. 167, 8 Rev. Rep. 604.

sometimes three pence would not be binding.⁹⁴

§ 21. **It must also be continued.**—A custom or usage to be binding must also be continued.⁹⁵ But, as said by Mr. Browne, “an interruption which is to prove valid against a custom must be an actual interruption of the usage, and not simply an interruption of the right.”⁹⁶ The length of time a series of acts must be continued to establish a usage depends upon the circumstances of the particular case. Thus, a period of three weeks has been held sufficient;⁹⁷ while, on the other hand, a period of five years has been held insufficient.⁹⁸ A mere act of indulgence or accommodation is not sufficient to establish a usage.⁹⁹

94. *Blewett v. Tregonning*, 3 A. & E. 554, 1 Hurl and W. 431, 4 L. J. K. B. 223, 5 N. & M. 234, 30 E. C. L. 260.

95. *Johnson v. Stoddard*, 100 Mass. 306; *McMasters v. Penn. Ry. Co.*, 69 Pa. St. 374, 8 Am. Rep. 264; *Citizens' Bank v. Grafflin*, 31 Md. 507, 1 Am. Rep. 66.

96. *Browne on Usages and Customs* 16.

97. *Wall v. East River Ins. Co.*, 3 Duer (N. Y.) 264 (usage in insurance business).

98. *Cooper v. Berry*, 21 Ga. 526, 68 Am. Rep. 468. See also, *Smith v. Rice*, 56 Ala. 417 (two years); *Bufford v. Tucker*, 44 Ala. 89 (two years); *Carlisle v. Wallace*, 12 Ind. 252, 74 Am. Dec. 207 (one month).

99. *Citizens' Bank v. Grafflin*, *supra* (bank had discounted numerous drafts and then forwarded them to drawees for acceptance); *Mobile, etc., Ry. Co. v. Jay*, 61 Ala. 247 (Ry. Co. had paid for medical services of employee injured while in its employ); *Norton v. Haywood*, 20 Me. 359 (owner of land had tacitly allowed others to cut timber thereon without treating them as trespassers).

§ 22. **It must also be reasonable.**—It is also essential, for a custom or usage to be binding, that it be reasonable.¹⁰⁰ The following customs or usages have been held unreasonable and void: a custom which gave to the finder of bees an absolute title to them;¹ a custom of mining coal and not supporting the surface;² a custom that a promissory note given in payment of a gold mine becomes void if the mine prove to be a failure;³ a custom that a tenant may acquire title to personality on the demised premises without paying anything for it;⁴ a custom of mine owners of directing water, pumped from their mines into natural courses which carried the polluted water into water courses of adjoining owners;⁵ a custom of the master of a vessel selling the cargo of a stranded vessel when not necessary to do so;⁶ a custom of exempting common carriers from liability for negligence;⁷ a custom of taking sand from the land of another;⁸ a custom of ap-

100. *McMasters v. Penn. Ry. Co.*, 69 Pa. St. 374, 8 Am. Rep. 264; *Currie v. Syndicate*, 104 Ill. App. 165; *Strong v. Gd. Trunk Ry. Co.*, 15 Mich. 206, 93 Am. Dec. 148; *Seccomb v. Prov. Ins. Co.*, 10 Allen (Mass.) 305.

1. *Fisher v. Steward, Smith* (N. H.) 60.

2. *Coleman v. Chadwick*, 80 Pa. St. 81, 21 Am. Rep. 93.

3. *Leonard v. Peeples*, 30 Ga. 61.

4. *Anewalt v. Hummel*, 109 Pa. St. 271.

5. *Penn. Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. R. 453, 57 Am. Rep. 445.

6. *Stillman v. Hurd*, 10 Tex. 107.

7. *Dunham v. Dey*, 13 Johns. (N. Y.) 44.

8. *Hill v. Lord*, 48 Me., 83; *Lufkin v. Haskell*, 3 Pick. (Mass.) 356.

propriating ice on public waters by merely staking it off;⁹ a custom of a merchant of balancing his books at the end of each fiscal year and charging interest on the balance due;¹⁰ a custom of keeping freight paid in advance although services are not rendered;¹¹ a custom of marine insurance companies to pay only two-thirds of the gross freight transported where there is a total loss;¹² a custom of computing the total price of stone, sold at a certain price per cubic yard, by measuring it after it has been built into a solid wall;¹³ a custom of allowing insurance agents commissions on renewal premiums, for three years from the expiration of their contracts;¹⁴ a custom of receiving a commission from both the vendor and the vendee for selling property;¹⁵ a custom of a bank not to rectify mistakes in paying checks after the party leaves the room;¹⁶ a custom of a bank occasionally to honor overdrafts;¹⁷ a custom of allowing pay for materials not received

9. *Becker v. Hall*, 116 Ia. 589, 88 N. W. R. 324.

10. *Graham v. Williams*, 16 Serg. & R. (Pa.) 257, 16 Am. Dec. 569.

11. *Emery v. Dunbar*, 1 Daly (N. Y.) 408.

12. *McGregor v. Penn. Ins. Co.*, 16 Fed. Cas., No. 8,811, 1 Wash. 39.

13. *Rogers v. Hayden*, 91 Me. 24, 39 Atl. R. 283.

14. *Castleman v. So. Mut. L. Ins. Co. v.*, 14 Bush. (Ky.) 197.

15. *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66.

16. *Gallatin v. Bradford*, 1 Bibb (Ky.) 209.

17. *Lancaster Bank v. Woodward*, 18 Pa. St. 357, 57 Am. Dec. 618.

or for services not rendered.¹⁸ Customs or usages which are repugnant to statutory provisions are also void.¹⁹

On the other hand, the following customs and usages have been held reasonable and valid: a custom of saw-mill owners to retain the slabs as part pay for sawing logs for others;²⁰ a custom of contractors to receive a profit from the amount paid employees where the contract is by the day;²¹ a custom which allows the pulling down of another's buildings, where necessary, to prevent the spreading of a fire, or the plowing of a head-land on another's land for the same purpose;²² a custom of switchmen to go between cars under certain circumstances;²³ a custom of brakemen to get aboard coal cars by climbing over the side;²⁴ a custom or habit of mules to stumble;²⁵ a custom or habit of a person to live a sober life;²⁶ a custom of the trustees of a church to serve

18. *Kendall v. Russell*, 5 Dana (Ky.) 50.

19. *Ocean Beach Assoc. v. Brindley*, 34 N. J. Eq. 438; *Penn v. Oldhauber*, 24 Mont. 287, 61 Pac. R. 649; *Fleming v. King*, 100 Ga. 449, 28 S. E. R. 239; *Lehman v. Marshall*, 47 Ala. 362.

20. *Hewitt v. John Week Lumber Co.*, 77 Wis. 548.

21. *McDonald v. Ford*, 87 Mich. 198.

22. *Fawcett v. Lowther*, 2 Ves. 300, 28 Eng. Reprint 193.
See also, 3 Salk. 112.

23. *Hisory v. Richmond & D. R. Co.*, 91 Ala. 514.

24. *Coats v. Boston & M. R. Co.*, 153 Mass. 297.

25. *Patterson v. So. & N. A. Ry. Co.*, 89 Ala. 318.

26. *Floytrop v. Boston & M. Ry. Co.*, 163 Mass. 152; *Van Gent v. Chicago, M. & St. P. Ry. Co.*, 80 Ia. 526.

without pay;²⁷ a custom of merchants to sell for cash;²⁸ a custom of railroads to operate turntables in a certain way;²⁹ a custom of people in general to cross a railroad at a certain point;³⁰ a custom of lumbermen as regards the mode of measuring logs;³¹ a custom of banks that the president, in the absence of the cashier, signs checks and drafts,³² and a custom of express companies to notify the consignor on the refusal of the goods.³³

§ 23. **It must also be known.**—A custom or usage of trade to be binding must also be known to the party.³⁴ It must be so well established and so notorious that knowledge will be conclusively presumed.³⁵ Thus, a custom among deal-

27. *Cicotte v. St. Anne's Church*, 60 Mich. 552.

28. *Tyler v. O'Reilly*, 59 Hun (N. Y.) 618, 36 N. Y. State Rep. 106.

29. *Bridger v. Ashville & S. Ry. Co.*, 27 S. C. 456, 13 Am. St. Rep. 653.

30. *Duncan v. Preferred Mut. Acci. Assoc.*, 129 N. Y. 623, 36 N. Y. State Rep. 928.

31. *Destrahan v. La. Cypress Lumber Co.*, 45 La. Ann. 87; *Adamant Plaster Co. v. Nat. Bank*, 5 Wash. 232.

32. *Neiffer v. Knoxville Bank*, 1 Head (Tenn.) 162.

33. *Am., etc., Exp. Co. v. Wolf*, 79 Ill. 430.

34. *Blodgett v. Vogel*, 130 Mich. 479, 90 N. W. R. 277; *Gilmer v. Young*, 122 N. C. 806, 29 S. E. R. 830; *Ambler v. Phillips*, 132 Pa. St. 167, 19 Atl. R. 71; *Howard v. Gt. West. Ins. Co.*, 109 Mass. 384.

35. *Beach v. Travelers' Ins. Co.*, 73 Conn. 118, 46 Atl. R. 867; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. R. 354; *Union Stock Yards Co. v. Westcott*, 47 Neb. 300, 66 N. W. R. 419; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349.

ers in horses that a warranty does not cover latent defects, which is unknown to a purchaser, does not bind him.³⁶ And a custom of a lessor of a mine, which is unknown to his lessee, is not binding on the lessee.³⁷

§ 24. **It must also be consistent.**—Another requisite of a custom or usage of trade is, it must be consistent. If two customs are contradictory both are void. Each destroys the other.³⁸ Neither, in such case, is reasonable; “for the absurdity and unreasonableness of two mutually inconsistent customs is evident, and if one custom be admitted to exist, the other, which is inconsistent with it, violates the requisite of reasonableness, and is therefore invalid.”³⁹ Again, a custom or usage of trade must not be repugnant to the express terms of the contract. This rule is applicable to both oral and written contracts. Thus, where an unambiguous contract was made for the purchase and sale of seven thousand bushels of corn, to be delivered several months later, and the vendee agreed to make advances on the contract of whatever money the vendor might need from time to time, but which he refused to do unless the vendor gave his promissory notes for the sums so advanced, which the vendor refused to do, in an action on the contract by the vendee against the vendor for damages for failing to de-

36. *Van Hoesen v. Cameron*, 54 Mich. 609, 20 N. W. R. 609.

37. *Beatty v. Gregory*, 17 Ia. 109, 85 Am. Dec. 546.

38. *Aldred's Case*, 9 Coke, 57b.

39. *Brown on Usages and Customs* 16.

liver the corn as agreed, the vend^{ee} sought to prove a custom among grain merchants to require promissory notes when money was advanced on purchases before the grain was delivered. The supreme court held, however, that as the custom was repugnant to the express terms of the contract parol testimony of the custom was inadmissible.⁴⁰

Other illustrations of the application of this principle are as follows: Where a lease expressly gives the landlord the waygoing crops a custom which gives it to the landlord may not be shown.⁴¹ Where an insurance agent's contract expressly states that certain commissions should be "as compensation in full for any and all services under this agreement" a custom which gives insurance agents commissions on renewals may not be shown.⁴² Where a contract for the purchase and sale of grain expressly stipulates that delivery is to be made at the place of shipment a custom that grain purchased is to be delivered

40. *Gilbert v. McGinnis*, 114 Ill. 28. See also, to the same effect, *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. R. 579; *Scott v. Hartley*, 126 Ind. 239, 25 N. E. R. 826; *Ryan v. Dubuque*, 112 Ia. 284, 83 N. W. R. 1073; *Lake Shore, etc., Ry. Co. v. Richards*, 126 Ill. 448, 18 N. E. R. 794; *Wolf v. Campbell*, 110 Mo. 114, 19 S. W. R. 622; *Wilson v. Smith*, 111 Ala. 170, 20 So. 134; *Branch v. Palmer*, 65 Ga. 210; *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679, 45 Pac. R. 7; *Meloche v. Chicago, etc., Ry. Co.*, 116 Mich. 69, 74 N. W. R. 301.

41. *Stultz v. Dickey*, 5 Binn. (Pa.) 285, 6 Am. Dec. 411.

42. *Castleman v. So. Mut. L. Ins. Co.*, 14 Bush (Ky.) 197.

at the place of destination may not be shown.⁴³ Where a guest at an inn orders his baggage sent to the commercial room a custom of putting guests' baggage in their rooms may not be shown.⁴⁴ Where a contract stipulates for the purchase and sale of "two flocks of sheep, except 'two bucks and a lame ewe'," at a certain price, a custom that the vendor may retain the wool on sheep sold may not be shown.⁴⁵ Where a contract for the purchase and sale of "sixty tons of ware potatoes, at £5 a ton" is silent as to the kind of ware potatoes meant, testimony that Regent ware potatoes were meant is inadmissible.⁴⁶ Where a contract for the purchase and sale of goods specifies the price "f. o. b. cars" at a designated place, a custom as to the meaning of the expression quoted, different from that of the words in full represented by the letters "f. o. b.", may not be shown.⁴⁷ Where a contract of employment specifies a definite period, a custom of giving two weeks' notice of an intention to terminate it may not be shown.⁴⁸ Where goods sold are transported by a common carrier and the bill of lading runs to the order

43. *Duncan v. Green*, 43 Ia. 679.

44. *Richmond v. Smith*, 8 B. & C. 9, 6 L. J. K. B. O. S. 279, 2 M. & R. 235, 15 E. C. L. 14.

45. *Groat v. Gile*, 51 N. Y. 431.

46. *Smith v. Jeffryes*, 15 L. J. Exch. 325, 15 M. & W. 561.

47. *Sheffield Furnace Co. v. Hull Coal, etc., Co.*, 101 Ala. 446, 14 So. 672.

48. *Mitchell v. Waite*, 61 N. Y. Suppl. 1108, 63 N. Y. Suppl. 165.

of the shipper, a custom which makes the consignee liable for deterioration during transit may not be shown.⁴⁹ Where a cargo of oil is insured, and there is a leakage caused by the violent rolling of the ship owing to a rough sea, a marine mercantile custom that insurance companies are not liable for leakage as a "peril of the sea" unless the cargo is shifted or the casks damaged may not be shown.⁵⁰ Where a cargo is insured against "perils of the sea," a mercantile custom in New York and New Orleans of treating the term "perils of the sea" in bills of lading as sufficiently broad in its scope to include damage caused by rats and other vermin, may not be shown.⁵¹ In an action against the owner of a steamboat for the loss of goods aboard, caused by the illegal seizure of the boat by armed men, a custom that the owner of the boat is not liable in such case, provided the officers and crew are free from fault, may not be shown.⁵²

§ 25. **It must also be compulsory.**—Another essential of a custom or usage of trade is, it must be compulsory and not merely optional. As said by Sir Wm. Blackstone, "A custom that all the inhabitants shall be rated towards the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his

49. *Charles v. Carter*, 96 Tenn. 607, 36 S. W. R. 396.

50. *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641, 3 L. J. K. B. O. S. 116, 27 Rev. Rep. 486, 10 E. C. L. 359.

51. *Aymer v. Astor*, 6 Cow (N. Y.) 266.

52. *Boon v. The Belfast*, 40 Ala. 184, 88 Am. Dec. 761.

own pleasure is idle and absurd, and indeed no custom at all.”⁵³ And as said by Mr. Browne, “A custom, to be binding, must be current. It must be known and understood by those whose conduct is to be affected by its existence, whose transactions are to be influenced by its actual terms; but if its terms were alterable at the will of each man to be bound to-day and not bound to-morrow by the custom, any one whose conduct might have to conform to such a rule would find it impossible to shape his actions accordingly, and any transactions which might have to be influenced by such precept would be varying, indefinite, uncertain, and absurd.”⁵⁴

§ 26. It must also be general and universal.—And lastly, a custom or usage of trade must be general and universal, among the members of the particular class, and within the territory, in which it operates.⁵⁵ As said by Shaw, C. J., “A casual or occasional exercise of a power by one of a few towns will not constitute a usage.”⁵⁶ And as said by Lord Ellenborough, “I can not hear of any arbitrary distinction between one part of the city and another. It is not competent to bankers to lay down one rule for the eastward of St. Paul’s and another for the westward. They

53. 1 Blk. Comm. 61.

54. Brown on Usages and Customs 24.

55. Syson v. Hieronymous, 127 Ala. 482, 28 So. R. 967; Scudder v. Bradbury, 106 Mass. 422; Coffman v. Campbell, 87 Ill. 98; Com. v. Phila. Co. Prison, 57 Pa. St. 291.

56. Hood v. Lynn, 1 Allen (Mass.) 103, 106.

might as well fix upon St. Peter's at Rome."⁵⁷

A particular custom may be applicable only to a particular class of persons; in which case no presumption arises that it is binding upon a person who is not a member of that class.⁵⁸

The fact that the majority of the people within certain territorial limits practice a particular mode of operations does not establish a custom or usage. To have such an effect the practice must be universal.⁵⁹

§ 27. **When parol evidence admissible to explain words and phrases.**—Some words and phrases are used in a double sense. They have an ordinary meaning and a technical meaning. When used in relation to ordinary transactions they are usually construed according to their ordinary and popular meaning. But when used in relation to scientific transactions, or others in which the technical use of words is appropriate, they are frequently used in a peculiar sense. In the latter case parol evidence is admissible to show the intention of the parties to use them in that sense.⁶⁰ Thus, parol evidence has been held

57. *Rickford v. Ridge*, 2 Camb. 537, 539.

58. *Bernard v. Mott*, 89 Mo. App. 403.

59. *Porter v. Hill*, 114 Mass. 106.

60. *Lyon v. Lennon*, 106 Ind. 567, 7 N. E. R. 311; *Bowman v. Spokane First Nat. Bank*, 9 Wash. 614, 38 Pac. R. 211, 43 Am. St. Rep. 870; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Norris v. Fowler*, 87 N. C. 9; *Kelly v. Waters*, 31 Mich. 404; *Cin. First Nat. Bank v Burkhardt*, 100 U. S. 686, 25 L. ed. 766; *Converse v. Wead*, 142 Ill. 132. See notes, 42 Am. Rep. 679; 6 L. R. A. 42.

admissible to show what was intended by the words "immediate delivery;"⁶¹ "barrels;"⁶² "cotton in bales;"⁶³ "team;"⁶⁴ "plastering a house;"⁶⁵ "loading off shore;"⁶⁶ "a thousand;"⁶⁷ "a day;"⁶⁸ "borrowed money;"⁶⁹ "homestead farm;"⁷⁰ "good custom cowhide;"⁷¹ "per square yard;"⁷² "hard pan;"⁷³ "skins and hides;"⁷⁴ "account;"⁷⁵ "due diligence;"⁷⁶ "horn chains;"⁷⁷ "bond;"⁷⁸ "currency;"⁷⁹ "winter strained oil;"⁸⁰ "a

61. *Nelson v. Smith*, 36 N. J. L. 148.

62. *Schiller v. Stevens*, 100 Mass. 518, 97 Am. Dec. 123, 1 Am. Rep. 139.

63. *Taylor v. Briggs*, 2 C. & P. 525

64. *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659.

65. *Walls v. Bailey*, 49 N. Y. 467.

66. *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87.

67. *Smith v. Wilson*, 3 B. & Ad. 728, 23 E. C. L. 319 (meant 1200).

68. *Cochran v. Retberg*, 3 Esp. 121 (only a working day).

69. *Murray v. Spencer*, 24 Md. 520.

70. *Locke v. Rowell*, 47 N. H. 46.

71. *Wait v. Fairbanks*, *Brayt.* (Vt.) 77.

72. *Walls v. Bailey*, *supra*.

73. *Blair v. Colby*, 37 Mo. 313.

74. *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202 (furs not included).

75. *Waldheim v. Miller*, 97 Wis. 300, 72 N. W. R. 869.

76. *Bartley v. Phillips*, 165 Pa. St. 325, 30 Atl. R. 842.

77. *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471.

78. *Stone v. Bradbury*, 14 Me. 185.

79. *Pilmer v. Des Moines Branch State Bank*, 16 Ia. 321; *Farwell v. Kennett*, 7 Mo. 595.

80. *Hart v. Hammett*, 18 Vt. 127.

week;"⁸¹ "root;"⁸² "inch of water;"⁸³ "to work a street;"⁸⁴ "expected;"⁸⁵ "due bill;"⁸⁶ "necessary signals and switchmen;"⁸⁷ "freight;"⁸⁸ "all faults;"⁸⁹ "with all faults;"⁹⁰ "ream;"⁹¹ "bale;"⁹² "a clear bill of lading;"⁹³ "sea-litter;"⁹⁴ "Canada money;"⁹⁵ "Texas money;"⁹⁶ "Kentucky currency;"⁹⁷ "accepted,"⁹⁸ etc.

On the other hand, parol evidence has been held inadmissible to show what was intended by

81. *Grant v. Maddox*, 16 L. J. Exch. 227, 15 M. & W. 737 (during only part of the year).
82. *Coit v. Commercial Ins. Co.*, 7 Johns. (N. Y.) 385, 5 Am. Dec. 282 (Sarsaparilla not included).
83. *Jackson Mill Co. v. Chandos*, 82 Wis. 437, 52 N. W. R. 759.
84. *In re Curtis*, 64 Conn. 501, 30 Atl. R. 769, 42 Am. St. Rep. 200.
85. *Bold v. Raymer*, 1 M. & W. 343.
86. *Andrews v. Robertson*, 111 Wis. 334, 87 N. W. R. 190, 87 Am. St. Rep. 870.
87. *Louisville & N. Ry. Co. v. Illinois C. Ry. Co.*, 174 Ill. 448, 51 N. E. R. 824.
88. *Paisch v. Dickson*, 1 Mason (U. S.) 11.
89. *Corter v. Coal Co.*, 77 Pa. St. 286.
90. *Whitney v. Boardman*, 118 Mass. 242.
91. *Ganson v. Madigan*, 15 Wis. 144.
92. *Gorrissen v. Perrin*, 2 C. B. N. S. 681.
93. *Creery v. Holly*, 14 Wend. (N. Y.) 26.
94. *Sheght v. Hartshorne*, 2 Johns. (N. Y.) 561.
95. *Thompson v. Sloan*, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546.
96. *Roberts v. Short*, 1 Tex. 373.
97. *Lampton v. Haggard*, 3 Mon. (Ky.) 149.
98. *Colgate v. Latta*, 115 N. C. 127, 20 S. E. R. 388.

the words "help;"⁹⁹ "deal;"¹⁰⁰ "delivered;"¹ "incompatible;"² "guarantee;"³ "legitimate railroad purposes,"⁴ etc.

Where words and phrases are used in a technical sense peculiar to particular professions, trades, occupations, or localities, or to the arts or sciences, parol evidence of usage in that technical sense is admissible.⁵ And "If it is a word which is of technical and scientific character, then it must be construed according to that which is the primary meaning in that technical and scientific character; and before you can give evidence of the secondary meaning of the word you must satisfy the court, from the instrument itself or from the circumstances of the case, that the word ought to be construed, not in its popular and primary signification, but according to its secondary meaning."⁶ But words and phrases which have not acquired a technical meaning with respect to the subject-matter, separate and

99. *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. R. 52.

100. *First Nat. Bank v. Coffin*, 162 Mass. 180, 38 N. E. R. 444.

1. *Lippert v. Saganaw Mill Co.*, 108 Wis. 512, 84 N. W. R. 831.

2. *Gray v. Shepard*, 147 N. Y. 177, 41 N. E. R. 500.

3. *Phelps v. Gamewell Fire Alarm Tel. Co.*, 72 Hun (N. Y.) 26.

4. *Abraham v. Oregon & C. R. Co.*, 37 Ore. 495, 60 Pac. R. 899, 82 Am. St. Rep. 779.

5. *Houghton v. Watertown Ins. Co.*, 131 Mass. 300; *Smith v. Clayton*, 29 N. J. L. 357; *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *Walrath v. Whittekind*, 26 Kan. 482.

6. *Holt v. Collyer*, 44 L. T. N. S. 214; L. R. 16 Ch. Div. 718.

distinct from their ordinary meaning, must be construed in their popular sense.⁷

§ 28. To explain the meaning of code letters.
The case of Kell v. Charmer.—In this case a testator had made the following bequests: "I give and bequeath to my son William the sum of i. x. x. To my son Robert Charles the sum of o. x. x." The testator had been a jeweler, and in his business had used certain private marks or symbols to denote prices or sums of money; and according to his code thus used the letters i. x. x. represented £100, and the letters o. x. x. £200. The court correctly held that parol evidence was admissible to show his habit of using the letters to represent the amounts indicated.⁸ It should be observed, however, that mere declarations by him of an intention to use the letters to represent the sums indicated would have been inadmissible.

§ 29. To explain the term "weekly account."
Case of Myers v. Sarl.—In this case the words "weekly account" were contained in a condition precedent of a building contract. The condition provided that no alterations or additions were to be made unless directed by the architects in writing, and a "weekly account" of the same be made to them every Monday. It was contended

7. *Drew v. Swift*, 46 N. Y. 204; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Cornwell v. Cornwell*, 91 Ill. 414; *French v. Hayes*, 43 N. H. 30, 80 Am. Dec. 127; *Nelson v. Morse*, 52 Wis. 240; *United States v. Peck*, 102 U. S. 64.

8. 23 Beav. 195.

that the term "weakly account" was a term of art well known in the building trade and to all builders and architects; and that parol testimony was admissible to prove its meaning. This testimony was objected to, but the court held that it was admissible.⁹ "Whether this evidence be as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed is not material. In either point of view, it will be admissible unless it labors under the obligation of introducing something repugnant to or inconsistent with the tenor of the written instrument."¹⁰

§ 30. To show surrounding circumstances. **Case of Reed v. Insurance Company.**—Parol evidence of the surrounding circumstances relating to a transaction, which tends to throw light upon it, is always admissible. It is to be observed, however, that in the case of a will it is always the *expressed* intention of the testator that governs. Parol evidence of surrounding circumstances to show his real intention would be in-

9. 3 El. & El. 306. In commenting on this case, Professor Thayer says: "This case is a valuable one as drawing attention to the fact that there is no difference in the application of this rule between one word and another. It is sometimes thought that a perfectly familiar expression like 'bushel' or 'pound,' or 'weekly account' (as here) cannot be thus interpreted." Professor Thayer's view, however, is in accord with the decision in this case.

10. *per* Lord Campbell, C. J., in *Humphrey v. Dale*, 7 E. & B. 266, 274.

admissible, if his real intention contradicted his expressed intention.

Figuratively speaking, the purpose of introducing parol evidence of surrounding circumstances is to put the court in the shoes of the parties to the transaction, so as to enable it to see the transaction thru the eyes of the parties who entered into it. A good illustration of the application of this principle is the case of *Reed v. Insurance Company*. An action was brought against the defendant company to recover \$5,000 insurance on the ship "Minnehaha," which was lost near Baker's Island. The policy contained the following provision: "the risk to be suspended while vessel is at Baker's Island loading." When the vessel was lost it was near Baker's Island, but it was not, at that time, *in the process of loading*. The question was, whether the exception in the policy applied to the vessel at the time she was lost; and the supreme court of the United States held that it did. A strictly literal construction of the exception would have necessitated a contrary ruling. But Bradley, J., who wrote the opinion, says (quoting Greenleaf): "The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used." And he also adds, "availing ourselves of the light of the surrounding circumstances in this case, as they appeared, or must be supposed to have appeared, to the

parties at the time of making the contract, we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not."¹¹

§ 31. **To explain an ambiguity. Lord Bacon's confusing statement.**—Upon the subject of ambiguities the decisions are in a chaotic state; not only as to their existence under certain circumstances, but also as to the admissibility of parol evidence to explain them. Much of this confusion has grown out of Lord Bacon's statement concerning them. This statement is as follows: "There be two sorts of ambiguities of words; the one is *ambiguitas patens* and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambibuitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matters of averment, which is of inferior account in law; for that we were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed which the law appointeth

shall not pass but by deed.”¹² Lord Bacon’s statement, as regards the exclusion of parol evidence to explain a patent ambiguity, is incorrect; and it has been subjected to much criticism, and also repudiated.¹³ Many courts, however, have followed, erroneously, Lord Bacon’s view.¹⁴ Mr. Steven says, “If the words of a document are so defective or ambiguous as to be unmeaning no evidence can be given to show what the author of the document intended to say.”¹⁵ Assuming that he uses the word “unmeaning” to signify *no meaning at all*, the statement is correct.

12. Circa 1597, Sir Francis Bacon, Maxims, rule XXV. (Works, Speddings, ed. 1861, Vol. XIV. 273). See also, Bacon’s Max. Reg. 23, 25; Brown’s Leg. Max. 608 *et seq.*
13. Palmer v. Albee, 50 Ia. 429; Tumlin v. Perry, 108 Ga. 520, 522, 34 S. E. R. 171; Excelsior Wrapper Co. v. Messenger, 116 Wis. 549, 93 N. W. R. 459; Simanton v. Vliet, 61 N. J. L. 595, 40 Atl. 595; Garvin Mach. Co. v. Hammond Typewriter Co. 159 N. Y. 539; 53 N. E. R. 1125; Ripon College v. Brown, 66 Minn. 179, 68 N. W. R. 837; Am. Savings Bank v. Shaver Carriage Co., 111 Ia. 137, 138, 82 N. W. R. 484; Montgomery v. Carlton, 56 Tex. 431; Ham v. Cerniglia, 73 Miss. 290, 18 So. 577; Citizens’ Bank v. Brigham, 61 Kan. 727, 60 Pac. R. 754; Lee v. Carter, 52 La. Ann. 1453, 27 So. R. 739; Gallagher v. Black, 44 Me. 99.
14. Pingry v. Watkins, 17 Vt. 379; Hollman v. Whitaker, 119 N. C. 113, 25 S. E. R. 793; Castleman v. Du Val, 89 Md. 657, 43 Atl. R. 821; Tallmadge v. Hooper, 37 Ore. 503, 61 Pac. R. 349, 1127; Delaware Indians v. Cherokee Nation, 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646; Doe v. Gwillim, 5 B. & Ad. 122, 27 E. C. L. 60.
15. Steph. Dig. of Evid., art. 91. See also, Campbell v. Johnson, 44 Mo. 247.

It is to be observed, however, that where words have merely a *doubtful* meaning, owing to a latent or patent ambiguity, parol evidence is admissible:

§ 32. Scope of parol evidence in the case of latent and patent ambiguities.—In the case of a patent ambiguity, which renders the intention of the party or parties to the document doubtful, parol evidence of intrinsic facts which throw light upon the intention of the parties, is admissible. In the case of a latent ambiguity, not only is evidence of intrinsic facts admissible, but also declarations of intention made by the party or parties to the document.¹⁶ As said by Mr. Underhill, “if a benefit is claimed by several persons, all answering the description of the will in one or more material particulars, though none of them answers to it perfectly and accurately in every particular, extrinsic evidence is received, including expressions of intentions.”¹⁷

§ 33. Subdivision of latent ambiguities.—A latent ambiguity is one which is brought to light by evidence *de hors* the document. The document itself gives no intimation of it. There are two subdivisions of latent ambiguities, which are as follows: (1) Where the person or thing, the object or subject of the disposition, is described in terms which are applicable indifferently to more than one person or thing. (2) Where the description of the person or thing is partly cor-

16. Browne's Parol Evid. 438; *Decker v. Decker*, 121 Ill. 341, 12 N. E. R. 750; *Miller v. Traverse*, 8 Bing. 244.

17. Underhill on the Law of Wills, § 910.

rect and partly incorrect, and the correct part leaves something equivocal.¹⁸

§34. Illustrations of the two subdivisions of latent ambiguities.—The first two examples given below illustrate the first subdivision of latent ambiguities, and the second two examples illustrate the second subdivision.

1. John Doe devises Maple Hill farm “to my nephew Thomas Doe.” Extrinsic evidence shows that there are two nephews of John Doe who exactly fit the description of the devisee.

2. In case 1, extrinsic evidence shows that John Doe was seized of two farms at his death, one named East Maple Hill and the other West Maple Hill.

3. Thomas Smith devises “my Oak Hill farm, in the occupation of John White, to my son Robert Henry Smith.” Extrinsic evidence shows that the testator’s Oak Hill farm was never occupied by John White.

4. In case 3, extrinsic evidence shows that the testator had only two sons, and that one was named Thomas Robert Smith and the other James Henry Smith.

In cases 1 and 2 all the courts agree that parol evidence is admissible to show not only surrounding circumstances but also declarations of intention made by the testator. But as regards cases 3 and 4 the decisions are in hopeless conflict, the explanation of which is given in § 35 and § 36 of this chapter.

18. Schouler on Wills (3d ed.), § 576.

§ 35. **The case of *Miller v. Traverse*.**—In this case, Tindal, C. J., discusses the two subdivisions of latent ambiguities as follows: "The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to show which manor was intended to pass and which son was intended to take. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised called A., and is described as in the occupation of B., and it is found, that though there is an estate called A., yet the whole is not in B's occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient in-

dication of intention appearing on the face of the will to justify the application of the evidence."¹⁹

§ 36. **Conflict in the decisions. Case of Doe v. Hiscocks.**—As regards the admissibility of declarations of intention, made by the party to the document to explain a latent ambiguity, the decisions are in hopeless conflict. As said by Brace, J., "There is much conflict of judicial opinion on the subject. The cases are numerous and irreconcilable."²⁰ This conflict, however, is confined to the *second* subdivision of latent ambiguities. All the courts agree, as previously stated, that declarations of intention, in the case of the first subdivision, are admissible.

In the case of Doe v. Hiscocks, which was decided seven years after the case of Miller v. Traverse, the court strongly approved of the decision in the latter case; and evidently believed that it was sustaining it in toto. As a matter of fact, however, upon the point of admitting declarations of intention in the case of the second subdivision of latent ambiguities, it overruled that case. And in England, the decision in Doe v. Hiscocks has been followed since the decision in this case was rendered. In this country a majority of the courts have followed the decision in Miller v. Traverse; but a considerable number of them have followed the decision in Doe v. Hiscocks. And this fact is the basis of Justice Brace's statement quoted above.

19. 8 Bing. 244.

20. Willard v. Darrah, 168 Mo. 660, 668.

Some text-book writers on evidence approve of the decision in *Miller v. Traverse* while others approve of the decision in *Doe v. Hiscocks*.

§ 37. Parol evidence admissible for purpose of identification.—Parol evidence is always admissible to identify a document, person, or thing, material to the case.²¹ Thus, it has been held admissible to identify land;²² a check;²³ a mill;²⁴ a church;²⁵ a tag on a valise;²⁶ lumber;²⁷ a monument;²⁸ a promissory note;²⁹ persons;³⁰ personal property including animals;³¹ a deed;³² a muti-

21. *Gage v. Cameron*, 212 Ill. 146, 72 N. E. R. 204; *Petrie v. Trustees*, 158 N. Y. 458, 53 N. E. R. 216; *King v. N. Y. & C. Gas Coal Co.*, 204 Pa. St. 628, 54 Atl. R. 477; *Bagley v. Rose Hill Sugar Co.*, 111 La. 249, 35 So. R. 676; *Johnson v. McKay*, 121 Ga. 763, 49 S. E. R. 757; *Doolan v. Carr*, 125 U. S. 618.
22. *Hadley v. Citizens' Sav. Inst.*, 123 Mass. 301; *Webster v. Blount*, 39 Mo. 500; *Peart v. Brice*, 152 Pa. St. 277; *Baker v. Hall*, 158 Mass. 361.
23. *Lewis v. Healey*, 73 Conn. 744, 48 Atl. R. 212.
24. *Scheibel v. Slagle*, 89 Ind. 323.
25. *Wyandotte Co. Com. v. Wyandotte Presb. Church*, 30 Kan. 620.
26. *Comm. v. Morrell*, 99 Mass. 542.
27. *Ames v. First Div. St. Paul, etc., Ry. Co.*, 12 Minn. 412.
28. *McAfferty v. Conover's Lessee*, 7 Ohio St. 99, 70 Am. Dec. 57.
29. *Goddard v. Sawyer*, 91 Mass. 78.
30. *Logan v. Gray, Tapp.* (Ohio) 69.
31. *Clark v. Crawfordsville Co.*, 125 Ind. 277; *Haller v. Parrott*, 82 Ia. 42; *Rugg v. Hale*, 40 Vt. 138.
32. *West v. State*, 22 N. J. L. 212.

lated document;³³ the beneficiary of a bank deposit;³⁴ a highway;³⁵ a contract;³⁶ the prior owner of money used in paying for land,³⁷ etc.

§ 38. **Same. Application of the rule to wills.**—Parol evidence has been frequently held admissible for the purpose of identification in the case of wills. As previously stated, however, it is the *expressed* intention that governs in this class of cases. But parol evidence of surrounding circumstances is always admissible when necessary to elucidate the expressed intention. On the other hand, parol evidence is inadmissible to prove facts inconsistent with the language of the will.³⁸ Moreover, as said by Mr. Wigram, "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are

33. *Baltes Land Co. v. Sutton*, 32 Ind. App. 14, 69 N. E. R. 179.

34. *Bartlett v. Remington*, 59 N. H. 364.

35. *Rich v. Rich*, 16 Wend. (N. Y.) 663.

36. *McClintock v. Hughes Bros. Mfg. Co.*, 29 Tex. App. 18.

37. *Ducie v. Ford*, 138 U. S. 587.

38. *Bingel v. Volz*, 142 Ill. 214, 34 Am. St. Rep. 64; *Waldron v. Waldron*, 45 Mich. 350; *Magee v. McNeal*, 41 Miss. 17, 90 Am. Dec. 354; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251; *Abercrombie v. Abercrombie*, 27 Ala. 489; *Massaker v. Massaker*, 13 N. J. E. 264; *Earl of Newburg v. Countess of Newburg*, 5 Madd. 364; *Miller v. Travers*, *supra*; *Charter v. Charter*, L. R. 7 H. L. 364; *Tucker v. Seaman's Society*, 7 Met. (Mass.) 182.

sensible with reference to intrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.”³⁹ Thus, where a legatee is designated in a will as “child,” there is a *prima facie* presumption that the testator meant a *legitimate* child; and if there is a legitimate child who meets the description, parol evidence is inadmissible to show that he really meant an illegitimate child.⁴⁰ On the other hand, where the proper meaning of the word is of absolute necessity excluded, as where there is no legitimate child, parol evidence is admissible to show that a certain illegitimate child was intended.⁴¹ This rule is applicable where the testator used the word “child” and really meant grandchild; and in other analogous cases.⁴²

§ 39. To disprove the legal existence of a document.—Where the purpose of introducing oral evidence is to disprove the legal existence of a document the parol evidence rule has no application. As said in a Vermont case, “The rule

39. Wigram on Wills, prop. II.

40. Wigram on Wills, prop. II.

41. Wigram on Wills, prop. II.

42. St. Luke's Home Assoc. 52 N. Y. 191, 11 Am. Rep. 697; Price v. Page, 4 Ves. Jr. 680; Washington v. Lee W. Appeal, 111 Pa. St. 572; Jones v. Newman, 1 W. Black, 60.

which prohibits the introduction of parol evidence to vary a written instrument has no application when the legal existence or binding force of the instrument is in question."⁴³ Thus, where two parties signed a written contract of purchase and sale of a patent, and it was orally agreed that the contract was not to become binding unless it should be approved by two specified experts, parol evidence was held admissible to show the oral agreement, and also, to show that only one of the experts approved of the patent.⁴⁴ Nor does the rule apply where the purpose of introducing the parol evidence is to show that a document is void because of a material alteration.⁴⁵

§ 40. To defeat the operation of an instrument owing to fraud, illegality, duress, incapacity of the parties, etc.—Parol evidence is always admissible to show fraud, illegality, duress, incapacity of the parties, etc.⁴⁶ In these cases the

43. *Webster v. Smith*, 72 Vt. 12, 13, 47 Atl. R. 101.

44. *Pym v. Campbell*, 6 E. & B. 370 (a leading case). See also, *Black v. Wabash, etc., Ry. Co.*, 111 Ill. 351, 53 Am. Rep. 628; *Joerdens v. Schrimpf*, 77 Mo. 383; *Earl v. Rice*, 111 Mass. 17; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. R. 961; *Gregg v. Groesbeck*, 11 Utah, 310, 40 Pac. R. 202, 32 L. R. A. 266; *Cummings v. Powell*, 116 Mo. 473, 21 S. W. R. 1079, 38 Am. St. Rep. 610.

45. *Eyerman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Lee v. Butler*, 167 Mass. 426; *McNail v. Welch*, 125 Ill. 623; *Richards v. Day*, 137 N. Y. 183.

46. *Snyder v. Free*, 114 Mo. 360; *Abbott v. Marshall*, 48 Me. 44; *Razor v. Razor*, 142 Ill. 375.

purpose of the parol evidence is not to vary or contradict the *language* of the instrument, but to show circumstances pertaining to the formation of the transaction with the view of defeating the operation of the document. Thus, parol evidence is admissible to show fraud;⁴⁷ illegality;⁴⁸ duress;⁴⁹ forgery;⁵⁰ coverture;⁵¹ infancy;⁵² gross intoxication;⁵³ mental incompetency,⁵⁴ etc.

§ 41. **To show mistake of fact.**—As a general rule, parol evidence is admissible to show a mistake of fact, but not a mistake of law. The effect of a mistake of fact in the formation of a con-

47. *Gore v. Malsby*, 110 Ga. 893, 36 S. E. R. 315; *Humbert v. Larson*, 99 Ia. 275, 68 N. W. R. 703; *Langley v. Rodriguez*, 122 Cal. 580, 55 Pac. R. 406, 68 Am. St. Rep. 70; *Gustaffson v. Rustemeyer*, 70 Conn. 125, 39 Atl. R. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644; *Cooper v. Rose Valley Mills*, 185 Pa. St. 115, 39 Atl. R. 824; *Rambo v. Pattison*, 133 Mich. 655, 95 N. W. R. 722; *Trambly v. Ricard*, 130 Mass. 259.
48. *Sherman v. Wilder*, 106 Mass. 537; *Succession of Fletcher*, 11 La. Ann. 59 (adulterous intercourse); *Detroit Salt Co. v. Nat. Salt Co.*, 134 Mich. 103, 96 N. W. R. 1 (restraint of trade); *Fenwick v. Ratcliff*, 6 Mon. (Ky.) 154 (usury).
49. *Heeter v. Glasgow*, 79 Pa. St. 79, 21 Am. Rep. 46; *McAllister v. Engle*, 52 Mich. 56, 17 N. W. R. 694.
50. *State v. Gonce*, 79 Mo. 600; *Patterson v. Collier*, 75 Ga. 419, 58 Am. Rep. 472.
51. *Dale v. Roosevelt*, 9 Cow. (N. Y.) 307; *Bradley v. Caswell*, 65 Vt. 231, 26 Atl. R. 956.
52. *Van Vaikenburgh v. Rouk*, 12 Johns. (N. Y.) 338; *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759.
53. *Prentice v. Achorn*, 2 Paige Ch. (N. Y.) 30.
54. *Deu v. Clark*, 10 N. J. L. 258; *Hoder v. Beard*, 54 Ohio St. 398, 43 N. E. R. 1040, 56 Am. St. Rep. 720.

tract, when it has any effect at all, is to render the contract void. Thus, where the subject-matter of a contract, unknown to the parties, has ceased to exist;⁵⁵ or one of the parties is mistaken as to the identity of the other party;⁵⁶ or is mistaken as to the nature of a written contract which he has been induced by the fraudulent representations of the other party to sign;⁵⁷ the contract is void. And parol evidence is admissible to show the mistake of fact.⁵⁸ Many cases hold that evidence of a mistake of fact is admissible only in a court of equity.⁵⁹ But the trend of the decisions, under the reformed procedure, is to the contrary.⁶⁰ To render parol evidence ad-

55. *Gibson v. Pelkie*, 37 Mich. 380; *Anderson v. Armstead*, 69 Ill. 452; *Riegel v. Ins. Co.*, 153 Pa. St. 134, 25 Atl. R. 1030; *Strickland v. Turner*, 7 Exch. 208.
56. *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. R. 367; *Boulton v. Jones*, 2 Hurl & N. 564.
57. *Walker v. Ebert*, 29 Wis. 194, 9 Am. Rep. 54; *Trambly v. Ricard*, 130 Mass. 259; *Schaper v. Schaper*, 84 Ill. 603; *Soper v. Peck*, 51 Mich. 563, 17 N. W. R. 57.
58. *Somerville v. Coppage*, 101 Md. 519, 61 Atl. R. 318; *Lassing v. James*, 107 Cal. 348, 40 Pac. R. 534; *Cooper v. Rose v. Valley Mills*, 185 Pa. St. 115, 39 Atl. 824; *Goode v. Riley*, 153 Mass. 685; *Butler v. State*, 81 Miss. 734, 33 So. R. 847; *White v. Jones*, 14 La. Ann. 681.
59. *Boyce v. Wilson*, 32 Md. 122; *Knowlton v. Campbell*, 48 W. Va. 294, 37 S. E. R. 581; *Dismukes v. Wright*, 20 N. C. 346; *Van Horn v. Van Horn*, 49 N. J. Eq. 327, 23 Atl. R. 1079; *Pierson v. McCall*, 21 Cal. 123.
60. *Schotte v. Meredith*, 192 Pa. St. 159, 43 Atl. R. 952; *Elliott v. Horton*, 28 Grat. (Va.) 766; *Sutton v. Sutton*, 25 Ga. 383. See also, 20 Cent. Dig. §§ 1990-2004.

missible to show a mistake of fact in relation to a document the mistake must be alleged in the pleadings.⁶¹ As a general rule, parol evidence is inadmissible to show a mistake of law.⁶²

Where there is a mistake of *expression* in reducing a contract to writing parol evidence is admissible to show the true intention of the parties. In such case a court of equity will reform the instrument and make it conform to the real agreement. It is essential, however, to a reformation of the instrument, that the evidence be clear and convincing.⁶³

Parol evidence is admissible to show a mistake of fact, not only in the case of contracts, but also in cases of deeds of land;⁶⁴ deeds of trust;⁶⁵ mortgages;⁶⁶ leases;⁶⁷ bills and notes;⁶⁸ assign-

61. *Krueger v. Nicola*, 205 Pa. St. 38, 54 Atl. R. 494; *Huff v. Thomas*, 1 Mon. (Ky.) 158.

62. *In re Meckley*, 20 Pa. St. 478; *Potter v. Sewall*, 54 Me. 142.

63. *Fudge v. Payne*, 86 Va. 306, *Stockbridge Co. v. Hudson Co.*, 102 Mass. 45; *Tesson v. Atl. Ins. Co.*, 40 Mo. 33, 93 Am. Dec. 293.

64. *White v. Miller*, 22 Vt. 380; *Way v. Lowery*, 72 Ga. 63; *Doe v. Pickett*, 51 Ala. 584; *Hedge v. Sims*, 20 Ind. 574; *Elliott v. Horton*, 28 Gratt. (Va.) 766.

65. *Lauderdale v. Hallock*, 7 Sm. & M. (Miss.) 622.

66. *Lippincott v. Whitman*, 83 Pa. St. 244; *Sieberling v. Tipton*, 113 Mo. 373, 21 S. W. R. 4 (in discharge of mortgage); *Armstrong v. Armstrong*, 36 La. Ann. 549; *Ellis v. Kenyon*, 25 Ind. 134.

67. *Snyder v. May*, 19 Pa. St. 235.

68. See 8 Cyc. 252, note 34.

ments;⁶⁹ etc. It should be remembered, however, that parol evidence is not admissible to modify the *expressed* intention of a testator as contained in his will.

§ 42. To show that a document purporting to be a contract was not so intended.—Where an instrument purports on its face to be a contract, parol evidence is inadmissible to vary its language; but parol evidence is admissible in such case to show that the parties intended the instrument not to be a contract.⁷⁰

§ 43. To prove a trust created by operation of law.—There are two classes of trusts created by operation of law. One is constructive trusts and the other resulting trusts. The former, which is always permeated with fraud, either actual or constructive, is created by operation of law to satisfy the requirements of honesty and fair dealing. When a person acquires the legal title to property by circumvention, imposition, or fraud, or by virtue of a confidential relation or influence, which renders it inequitable for him to enjoy the beneficial interest of the property, a court of equity will raise a trust by construction, and treat such person as trustee of the property holding the legal title for the benefit of the party thus imposed upon. And parol evidence is ad-

69. *Bolster v. Bismark Bldg., etc., Assoc.*, 29 Pittsburg Leg. J. (Pa.) 97.

70. *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195; *Bruce v. Snow*, 18 N. H. 514; *Hathaway v. Rogers*, 112 Ia. 638, 84 N. W. R. 674.

missible in such case to show the acts and circumstances upon which the constructive trust is founded. Thus, where a partner clandestinely takes a renewal lease in his own name a court of equity will treat him as a trustee of the property for the benefit of the firm.⁷¹

Again, where a person purchases property for another with the latter's money and takes title in his own name, a court of equity will treat the grantee as a trustee of the property for the use and benefit of the party who furnishes the money. And parol evidence is admissible in such case to show the circumstances from which the resulting trust is impliedly created.⁷² As said by Magruder, J., "Since the whole foundation of resulting trusts of this class is the ownership and payment of the purchase money by one when the title is taken in the name of another, it follows that such trusts may be established by parol evidence."⁷³

§ 44. To show non-acceptance. — Where a writing is signed by only one of the parties to a contract parol evidence is admissible to show

71. *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252. See also, *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Thompson's Appeal* 22 Pa. 16; *King v. Cushman*, 41 Ill. 31, 89 Am. Dec. 366; *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229.

72. *Van Buskirk v. Van Buskirk*, 148 Ill. 8, 19; *Springer v. Kroeschell*, 161 Ill. 358, 362; *Ryder v. Loomis*, 161 Mass. 161, 36 N. E. R. 836.

73. *Van Buskirk v. Van Buskirk*, *supra*.

that the other party has not accepted it.⁷⁴ And parol evidence is admissible to show non-acceptance of a grant,⁷⁵ deed of trust,⁷⁶ or lease.⁷⁷ Also to show that a writing which purports to be an official certificate is a forgery.⁷⁸

§ 45. **To vary the effect of a receipt.**—The parol evidence rule is not applicable to a mere receipt. Such an instrument, even when it expressly states that it is “in full of all demands,” does not possess such a contractual nature as to make the rule applicable. In such case parol evidence is admissible to contradict the written statement.⁷⁹ But where a writing which is in the form of a receipt embodies the elements of a contract parol evidence is inadmissible to vary it.⁸⁰ And where a writing embodies the elements of both a receipt and a contract parol evidence is admissible to vary the part which constitutes merely

74. *Stone v. Daggett*, 73 Ill. 367.

75. *Corbett v. Norcross*, 35 N. H. 99.

76. *Armstrong v. Morrill*, 14 Wall. (U. S.) 120, L. ed. 765.

77. *Johnson v. Smith*, 165 Pa. St. 195, 30 Atl. R. 675.

78. *Hopkins v. Danby School Dist.*, 27 Vt. 281.

79. *Haverly v. State Line, etc., Ry. Co.*, 125 Pa. St. 116, 17 Atl. R. 224; *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. R. 113; *Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548; *Mounce v. Kurtz*, 101 Ia. 190, 70 N. W. R. 119; *Rarden v. Cunningham*, 136 Ala. 263, 34 So. R. 26.

80. *Fordice v. Scribner*, 108 Ind. 85, 9 N. W. R. 122; *Gravlee v. Lambkin*, 120 Ala. 210, 24 So. R. 756; *Thompson v. Williams*, 30 Kan. 114, 1 Pac. R. 47; *Cohen v. Jacoboice*, 101 Mich. 409, 59 N. W. R. 665; *Cass v. Brown*, 68 N. H. 85, 44 Atl. R. 86; *Grier v. Mut. L. Ins. Co.*, 132 N. C. 132, 44 S. E. R. 28.

a receipt, but inadmissible to vary the part which is contractual.⁸¹

According to the better view, the customary warehouse and storage receipt is contractual in its nature, and parol evidence is not admissible to vary it.⁸² But where it is only a mere acknowledgment of the receipt of property it may be varied by parol evidence.⁸³

A receipt which embodies an agreement of compromise, and which is in the nature of an accord and satisfaction, is within the parol evidence rule. In the absence of fraud, accident or mistake, oral evidence is inadmissible to vary it.⁸⁴

§ 46. Application of the rule to a release.— Usually, a release is of a contractual nature; and where it is of such a nature parol evidence is inadmissible to vary it.⁸⁵ But where it partakes of the nature of a mere receipt it may be varied by parol evidence.⁸⁶ Thus, where the writing is a

81. *Goodwin v. Goodwin*, 59 N. H. 548; *Hossack v. Moody*, 39 Ill. App. 7.

82. *Thompson v. Thompson*, 78 Minn. 389, 81 N. W. R. 204, 543; *Hirsch v. Salem Mills Co.*, 40 Ore. 601, 67 Pac. 949, 68 Pac. 733; *Union Storage Co. v. Speck*, 194 Pa. St. 126, 45 Atl. R. 48.

83. *Hirsch v. Salem Mills Co.*, *supra*.

84. *Jackson v. Ely*, 57 Ohio St. 450, 49 N. E. R. 792; *Kammernmeyer v. Hilz*, 107 Wis. 101, 82 N. W. R. 689.

85. *Leddy v. Barney*, 139 Mass. 394, 2 N. E. R. 107; *Clark v. Mallory*, 185 Ill. 227, 56 N. E. R. 1099; *Atchison, etc., Ry. Co. v. Vanordstrand*, 67 Kan. 386, 73 Pac. R. 113; *Van Bokkelen v. Taylor*, 62 N. Y. 105; *Cassilly v. Cassilly*, 57 Ohio St. 582, 49 N. E. R. 795.

86. *Scott v. Scott*, 105 Ind. 584, 5 N. E. R. 397.

mere recital of payment of the consideration parol evidence is admissible to vary it.⁸⁷ And where a writing under seal certifies to the payment of a mortgage and the accompanying note, and authorizes the register of deeds to discharge the mortgage on the record, parol evidence is admissible to vary or contradict it.⁸⁸

§ 47. Rule not applicable to a writing which is not evidence of a right.—Where a writing is not contractual, or does not dispose of property, but merely acknowledges a fact, parol evidence is admissible to vary it.⁸⁹ Thus, statements of account,⁹⁰ memoranda,⁹¹ bills of parcels,⁹² etc., may be varied by parol evidence.

§ 48. Rule not applicable to mere clerical errors.—The parol evidence rule is not applicable to mere clerical errors. Thus, parol evidence has been held admissible to show that the description of a lot in a deed was made thru error and accident, and that the lot actually sold was a different one from that described in the deed.⁹³ And it has been held admissible to explain and

87. *Soule v. Soule*, 157 Mass. 451, 32 N. E. R. 663.

88. *Thompson v. Layman*, 41 Minn. 295, 42 N. W. R. 1061.

89. *Labbee v. Johnson*, 66 Vt. 234, 28 Atl. R. 986; *Smith v. Mayfield*, 163 Ill. 447, 45 N. E. R. 157; *Clifford v. Baessman*, 41 Wis. 597.

90. *Parker v. Miller*, 27 N. J. L. 338; *Hostetler*, 62 Ind. 183.

91. *Thomas v. Nelson*, 69 N. Y. 118; *Steed v. Harvey*, 18 Utah 367, 54 Pac. R. 1011, 72 Am. St. Rep. 789.

92. *Irwin v. Thompson*, 27 Kan. 643; *Stacy v. Kemp*, 97 Mass. 166.

93. *Palangue v. Guesnor*, 15 La. 311.

correct irreconcilable dates in an administrator's deed.⁹⁴ It also has been held that while parol evidence is not competent to contradict and change the calls in a grant or deed, it may be used, and marked lines proved, to locate the corner called for, or to show that, by a *slip of the pen* a course different from that intended was written in making out the survey and grant, as *south* instead of *north*.⁹⁵ Also, that a mistake in drawing an instrument contrary to the intention of the parties is a ground for relief in equity.⁹⁶

§ 49. **To show the real consideration.**—Ordinarily, parol evidence is admissible to show the real consideration of the transaction.⁹⁷ Thus, it is admissible to show that it was less,⁹⁸ or more,⁹⁹ than that expressed in the instrument; or to show what the term "other considerations" comprised;¹⁰⁰ or to show the actual consideration where

94. *Moore v. Wingate*, 53 Mo. 398.

95. *Davidson v. Shuler*, 119 N. C. 686.

96. *Chapman v. Allen*, Kirby (Conn.) 399, 1 Am. Dec. 24.

97. *Sioux City First Nat. Bank v. Flynn*, 117 Ia. 493, 91 N. W. R. 784; *Clark v. Hedden*, 109 La. 147, 33 So. R. 116; *Smith v. McLean*, 146 Ind. 77, 45 N. E. R. 41; *Arnold v. Arnold*, 137 Cal. 291, 70 Pac. R. 23; *Booth v. Hynes*, 54 Ill. 363; *Folmar v. Siler*, 132 Ala. 297, 31 So. R. 719; *Butt v. Smith*, 121 Wis. 566.

98. *Hodges v. Heal*, 80 Me. 281, 14 Atl. 11, 6 Am. St. Rep. 199; *Pique v. Arendale*, 71 Ala. 91.

99. *McGary v. McDermott*, 207 Pa. St. 620, 54 Atl. R. 46; *Galvin v. Boston El. Ry. Co.*, 180 Mass. 587, 62 N. E. R. 961.

100. *Cheesman v. Nicholl*, 18 Colo. App. 174, 70 Pac. R. 797; *Nickerson v. Saunders*, 36 Me. 413.

it is given as nominal in the writing;¹ or where the writing expresses no consideration at all.² It has been held that where a consideration is expressed in the document the additional consideration shown by parol must be different in quality or character from that expressed.³ The consideration expressed in a deed or other instrument is *prima facie* the amount agreed to be paid; but it may be shown by parol that in addition the grantor was to have the privilege of raising for his own use a crop of wheat upon the land conveyed;⁴ or that the grantee agreed to erect a sawmill on the land;⁵ or to pay the grantor one-half the profit in case of a resale;⁶ or grade a certain lot, and remove a building;⁷ or to build a depot on the land;⁸ or that intoxicating liquors should not be sold on the land;⁹ or that the grantee (grantor's wife) would devise to the grantor one-third of her estate, in-

1. Harraway v. Harraway, 136 Ala. 499, 34 So. R. 836.
2. Trustees v. Saunders, 84 Wis. 570, 54 N. W. R. 1094; Guidery v. Green, 95 Cal. 630.
3. Hyne v. Campbell, 6 Mon. (Ky.) 286.
4. Breitenwischer v. Clough, 111 Mich. 6, 69 N. W. R. 88, 66 Am. St. Rep. 372.
5. Fraly v. Bentley, 1 Dak. 25, 46 N. W. R. 506.
6. Thomas v. Barker, 37 Ala. 392.
7. Mobile, etc., Ry. Co. v. Wilkinson, 72 Ala. 286.
8. Louisville, etc., Ry. Co. v. Neafus, 93 Ky. 53, 18 S. W. R. 1030, 13 Ky. L. Rep. 951.
9. Hall v. Solomon, 61 Conn. 476, 23 Atl. R. 876, 29 Am. St. Rep. 218.

cluding the land conveyed;¹⁰ or that the grantee agreed to assume a certain incumbrance,¹¹ or support the grantor,¹² or consummate a marriage,¹³ etc. As said in a Maine case, "*The only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor. For every other purpose, it may be varied or explained by parol proof. The grantor may show, notwithstanding the acknowledgment of payment, that no money was paid, and recover the price, in whole or part, against the grantee.*"¹⁴ And even where the grantor covenants against incumbrances, parol evidence is admissible to show that the grantee orally agreed, as part of the consideration, to assume specific existing incumbrances.¹⁵

Parol evidence is admissible to show the real consideration in the case of documents other than deeds. Thus, it has been held admissible

10. *Manning v. Pippin*, 86 Ala. 357, 5 So. R. 572, 11 Am. St. Rep. 46.
11. *Hays v. Peck*, 107 Ind. 389; *Harts v. Emery*, 184 Ill. 560, 56 N. E. R. 865; *Lowry v. Downey*, 150 Ind. 364, 50 N. E. R. 79.
12. *Coleman v. Gammon*, (Ia.), 83 N. W. R. 898.
13. *Tolman v. Ward*, 86 Me. 303, 29 Atl. R. 1081, 41 Am. St. Rep. 556.
14. *Goodspeed v. Fuller*, 46 Me. 147, 71 Am. Dec. 576 and note. See also, *Cardinal v. Hadley*, 158 Mass. 352, 35 Am. St. Rep. 492.
15. *Johnson v. Elmen*, 94 Tex. 168, 59 S. W. R. 253, 86 Am. St. Rep. 845, 52 L. R. A. 162.

in the case of bonds;¹⁶ assignments;¹⁷ releases;¹⁸ bills of sale;¹⁹ contracts,²⁰ etc.

Where the expressed consideration constitutes an operative part of a contractual act it may not be contradicted by parol evidence. Thus, in an action against a railway company for damages for personal injuries the company pleaded a release, and the plaintiff replied that the release was without consideration. The release obligated the company to pay the plaintiff a specified sum "in addition to all fees and charges payable to physicians and St. Vincent's hospital for services and care rendered to said Houlihan on account of such injuries, which amount of fees and charges said company, as a part of said compromise, agrees to pay;" and the court held that the consideration expressed constituted an operative part of a contractual act, and therefore, parol evidence was not admissible to vary or contradict it.²¹ But where the consideration expressed

16. *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334, 9 N. E. R. 372; *Baldwin v. Carter*, 17 Conn. 201, 42 Am. Dec. 735.
17. *Kidder v. Vandersloot*, 114 Ill. 133, 28 N. E. R. 460; *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 So. R. 405.
18. *Galvin v. Boston El. Ry. Co.*, 180 Mass. 587, 62 N. E. R. 961; *Fry v. Prewett*, 56 Miss. 783.
19. *Halpin v. Stone*, 78 Wis. 183, 47 N. W. R. 177; *Wolf v. Haslach*, 65 Neb. 303, 91 N. W. R. 283.
20. *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. R. 781; *Anderman v. Meier*, 91 Minn. 413, 98 N. W. R. 327; *Graver v. Scott*, 80 Pa. St. 88.
21. *Indianapolis Union Ry. Co. v. Houlihan*, 157 Ind. 494, 508.

in a release is a mere recital of the amount, and is not contractual, parol evidence is admissible to vary or contradict it.²²

§ 50. Parol evidence admissible to rebut or support an equity.—Parol evidence is always admissible to rebut an equity.²³ A presumption raised by parol evidence may be rebutted by parol evidence.²⁴ Thus, where back land is sold and the deed is silent as to a way of ingress and egress, and parol evidence raises a presumption of a way of necessity across the grantor's land adjoining, parol evidence is admissible to show an oral agreement between the grantor and the grantee that no way of necessity across the grantor's land exists.²⁵ And where a testator bequeaths two sums of money of equal amount to a person, one being expressed in the original will and the other in a codicil, and the motive expressed in each case is the same, a disputable presumption of law arises that the legacies are not cumulative. This presumption, however, may be rebutted by parol evidence to the contrary. As said by Plumer, V. C., "where the court raises the presumption against the intention of a double gift, by reason that the sums and motives are the same in both instruments, it will re-

22. *Stewart v. Chicago, etc., Ry. Co., and C. and I. C. Ry. Co.*, 141 Ind. 55, 59. See also, *Levering v. Shockey*, 100 Ind. 558.

23. *Hughes v. Wilkinson*, 35 Ala. 453.

24. 3 *Greenleaf on Evid.*, § 366.

25. *Lebus v. Boston*, 107 Ky. 98, 52 S. W. R. 956.

ceive evidence that the testator actually intended the double gift he has expressed."²⁶ It is to be observed, however, that the two legacies must be equal in amount, and the motive for each the same. Moreover, it is essential that the motive be *expressed in each case*. As said by Plumer, V. C., in the case cited, "The court raises this presumption only where the double coincidence occurs, of the same motive and the same sum in both instruments. It will not raise it if in either instrument there be no motive, or a different motive, expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments and the sums be different." In the case cited, one legacy was £ 300 and the other £ 500; and the court held that as the amounts were different there was no presumption that the testator intended the legacies not to be cumulative. Again, as said by Lord Bacon, "where a man devises particular legacies to his executors and makes no disposition of the surplus of his estate; in this case, according to the notions of the courts of equity, the executors shall be only trustees for the next of kin; but to rebut this equity, which arises by implication only, the executors have been allowed to prove by parol evidence that the testator designed them the surplus."²⁷

Parol evidence is not admissible, in the first instance to *support* an equity. But after an equity

26. *Hurst v. Beach*, 5 Madd. 351.

27. 2 Bacon's Abridg. (1st ed.) 309.

has been rebutted parol evidence is admissible to support it. Where the equity has not been rebutted, there is no necessity for introducing parol evidence to support it. Moreover, its effect, if any, would be to contradict the language of the instrument. As said in an English case, "in the absence of evidence to countervail the presumption no parol evidence in support of it can be adduced. In the first place, such evidence would be unnecessary; and next, its effect, if it had any, would be to contradict the language of the instrument."²⁸

§ 51. Parol evidence admissible to prove a set-off.—The parol evidence rule has no application to the introduction of oral evidence by the obligor or promisor to prove a set-off.²⁹

§ 52. Parol evidence admissible to prove a subsequent oral agreement.—As a general rule, parol evidence is admissible to prove *subsequent* oral agreements.³⁰ Ordinarily, the parol evidence rule is restricted to prior and contemporaneous agreements. Thus, parol evidence has been held admissible to show a subsequent oral agreement

28. *Palmer v. Newell*, 20 Beav. 32, 8 De G. M. & G. 74, 24 L. J. Ch. 424. See also, *Reynolds v. Robinson*, 82 N. Y. 103, 107; *Richards v. Humphreys*, 15 Pick. (Mass.) 133, 139.

29. *Noyes v. Hall*, 28 Vt. 645.

30. *Todd v. Allen*, 18 Kan. 543; *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. R. 683; *Davis v. Scovern*, 130 Mo. 303, 32 S. W. R. 986; *Town v. Jepson*, 133 Mich. 673, 95 N. W. R. 742; *Tyson v. Post*, 108 N. Y. 217, 15 N. E. R. 316, 2 Am. St. Rep. 409; *Heilman v. Weinman*, 139 Pa. St. 143, 21 Atl. 29; *Adams v. Battle*, 125 N. C. 152, 34 S. E. R. 245.

that interest should be payable semi-annually instead of annually;³¹ that the landlord would pay for certain specified repairs;³² that he would accept less rent than that stated in the lease;³³ that performance occur at a different place;³⁴ that delivery be made at a certain specified place;³⁵ that title to the property sold remain in the vendor for a specified time;³⁶ that the vendor orally warranted the property sold,³⁷ etc.

To render parol evidence of a subsequent oral agreement admissible it is essential to show that it was founded upon a valuable consideration.³⁸

§ 53. **Same. Sealed instruments.**—As to the admissibility of parol evidence of a subsequent oral agreement to vary the contents of a *sealed* instrument, the decisions are conflicting. Some hold it is inadmissible,³⁹ while others hold the contrary.⁴⁰ Where the instrument is required by law to be under seal it would seem that the parol evidence should be excluded. And this is un-

31. *Sharp v. Wycoff*, 39 N. J. E. 376.

32. *Woodworth v. Thompson*, 44 Neb. 311.

33. *Boos v. Dulin*, 103 Ia. 331, 72 N. W. R. 533; *Nicol v. Burke*, 78 N. Y. 580.

34. *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180.

35. *Miles v. Roberts*, 34 N. H. 245.

36. *Keeney v. Swan*, 2 N. Y. St. 214.

37. *McCormick Harvesting Machine Co. v. Hiatt*, 4 Neb. 587, 95 N. W. R. 627.

38. *Phillips v. Longstreth*, 14 Ala. 337. See also, 9 Cyc. 308 *et seq.*

39. *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. R. 213; *Zihlman v. Cumberland Glass Co.*, 74 Md. 303, 22 Atl. R. 271.

40. See citations in Cyc. 596, note 85, 597 note 86.

doubtedly the better view. The rule has been held applicable to a subsequent oral agreement to *rescind* a written contract, as well as to a subsequent oral agreement to *vary* it.⁴¹ It has been held, however, that parol evidence is admissible to show a subsequent oral agreement to *extend the time of performance* of a contract under seal.⁴² Under the California code parol evidence of a subsequent oral agreement is restricted to the doing or suffering of something not required to be done or suffered by the terms of the writing.⁴³

§ 54. **Same. Statute of frauds.**—There is also considerable conflict in the decisions as to the admissibility of parol evidence of a subsequent oral agreement to vary the contents of a written contract which the statute of frauds requires to be in writing. According to the English rule the parol evidence is inadmissible.⁴⁴ And the great weight of American authority,⁴⁵ including decisions of the supreme court of the United States,⁴⁶

41. *Sinard v. Patterson*, 3 Blackf. (Ind.) 353; *Delacroix v. Bulkley*, 13 Wend. (N. Y.) 71. But see cases cited in 9 Cyc. 596, note 85, 597 notes 86, 91. Also, *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. R. 673.

42. *Lawrence v. Miller*, 86 N. Y. 131; *Branch v. Wilson*, 12 Fla. 343. See also, cases cited in 9 Cyc. 597, note 87.

43. *Mackinzie v. Hodgkin*, 126 Cal. 591, 59 Pac. R. 33, 77 Am. St. Rep. 209.

44. *Marshall v. Lynn*, 6 Mees. & W. 109; *Stead v. Dauber*, 10 Adol. & E. 57.

45. *Walter v. Victor G. Bloede Co.*, 94 Md. 80.

46. *Swain v. Seamans*, 9 Wall. (U. S.) 271, 19 L. Ed. 554. See also, to the same effect, *Emerson v. Slater*, 22 How.

is in harmony with the English view. In the first case cited in foot-note 46 the court says: "Views of the complainants are that an agreement, though in writing and under seal, may in all cases be varied as to time or manner of performance, or may be waived altogether, by a subsequent oral agreement; but the court is of a different opinion if the agreement to be modified is within the statute of frauds. . . Reported cases may be found where that rule is promulgated without any qualification; but the better opinion is that a written contract falling within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of *Marshall v. Lynn* is that the terms of a contract for the sale of goods falling within the operation of the statute of frauds cannot be varied or altered by parol."

§ 55. Parol evidence rule not applicable to third parties.—Ordinarily, the parol evidence rule is not applicable to strangers to the document. It is restricted to the parties to it and those who claim under it.⁴⁷ Nor does the rule

(U. S.) 28, 16 L. Ed. 360; *Railroad Co. v. Trimble*, 10 Wall. (U. S.) 367, 19 L. Ed. 948; *Delaware v. Iron Co.*, 14 Wall. (U. S.) 579, 20 L. Ed. 779; *Hawkins v. United States*, 96 U. S. 689, 24 L. Ed. 607.

47. *Hartz v. Emery*, 184 Ill. 560, 56 N. E. R. 865; *Folinsbee v. Sawyer*, 157 N. Y. 196, 51 N. E. R. 994; *Livingston v. Heck*, 122 Ia. 74, 94 N. W. R. 1098; *Dunn v. Price*, 112 Cal. 46, 44 Pac. R. 354; *Myers v. Taylus*, 107 Tenn. 364, 64 S. W. R. 719.

apply where a stranger is a party to the suit; even when one of the parties to the document is the other party.⁴⁸ Moreover, since the stranger in such case may introduce parol evidence to vary the terms of the instrument, the other party to the suit, although a party to the instrument, is entitled to the same privilege.⁴⁹ This principle has been applied to leases;⁵⁰ insurance policies;⁵¹ deeds;⁵² chattel mortgages;⁵³ licenses;⁵⁴ contractual receipts;⁵⁵ bills of sale,⁵⁶ etc. It also has been applied even to a judicial record.⁵⁷

Where a third party is entitled to benefits growing out of a transaction which is evidenced by a writing, parol evidence is admissible to establish his rights.⁵⁸

§ 56. Admissibility of parol evidence to prove

48. *Livingston v. Stevens*, 122 Ia. 62, 94 N. W. R. 925; *Northern Assur. Co. v. Chicago Mut. Bldg., etc., Assoc.*, 198 Ill. 474, 64 N. E. R. 979; *O'Connell v. Kelly*, 114 Mass. 97; *Burns v. Thompson*, 91 Ind. 146; *Dickey v. Grice*, 110 Ga. 315.

49. Cases cited in foot-note 48.

50. *Gates v. Steele*, 48 Ark. 539, 4 S. W. R. 53.

51. *Pittman v. Harris*, 24 Tex. Civ. App. 503, 59 S. W. R. 1121.

52. *Carmack v. Drum*, 32 Wash. 236, 73 Pac. R. 377; *Dickey v. Grice*, *supra*.

53. *Schultz v. Plankinton*, 141 Ill. 116.

54. *Wooster v. Simonson*, 20 Fed. R. 316.

55. *Furbush v. Goodwin*, 25 N. H. 425.

56. *Gregory v. Murrell*, 37 N. C. 233.

57. *Den v. Clark*, 10 N. J. L. 217, 18 Am. Dec. 417; *Watson v. Holly*, 57 Ala. 335.

58. *Stowell v. Eldred*, 39 Wis. 614.

a reservation.—As to the admissibility of parol evidence to prove a reservation the decisions are not harmonious. Some courts hold that parol evidence is admissible to prove an oral agreement reserving to the grantor growing crops;⁵⁹ while other courts hold the contrary.⁶⁰ Some hold that parol evidence is admissible to prove an oral agreement reserving to the grantor the right to occupy the premises for a specified time after the delivery of the deed free of rent;⁶¹ while others hold the contrary.⁶² It has been held that an oral agreement reserving to the grantor the right to dispose of the manure on the land may be shown.⁶³ While on the other hand, all the courts hold that parol evidence is inadmissible to prove an oral agreement reserving to the grantor fixtures on the land.⁶⁴

§ 57. To show the object of the parties in executing and delivering a deed.—Parol evidence is inadmissible to vary or contradict the *language*

59. *Simanek v. Nemetz*, 120 Wis. 42, 97 N. W. R. 508; *Harvey v. Million*, 67 Ind. 90; *Backenstoss v. Stahler's Adm.*, 33 Pa. St. 251, 75 Am. Dec. 592; *Adams v. Watkins*, 103 Mich. 431, 61 N. W. R. 774.

60. *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Wintermute v. Light*, 46 Barb. (N. Y.) 278.

61. *Hersey v. Verrill*, 39 Me. 271.

62. *Gilbert v. Buckeley*, 5 Conn. 262, 13 Am. Dec. 57.

63. *Strong v. Doyle*, 110 Mass. 92.

64. *Slocum v. Seymour*, 36 N. J. L. 138, 13 Am. Rep. 432; *Detroit Ry. Co. v. Forbes*, 30 Mich. 166. See also, note 12 Eng. Rep. 241-250.

of a deed.⁶⁵ Thus, it has been held inadmissible to prove an oral agreement obligating the *grantor* to pay off existing incumbrances;⁶⁶ or to modify a stipulation in the deed obliging the grantee to do so;⁶⁷ or to modify the operation of the deed.⁶⁸ On the other hand, parol evidence is admissible to show the *object* of the parties in executing and receiving the instrument. Thus, parol evidence is admissible to show that a deed was executed and delivered to secure a loan, defraud creditors, give a preference, or for any other object not apparent on its face. As said by Field, J., "The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid any inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face."⁶⁹ It is common practice to in-

65. *Kershaw v. Kershaw*, 102 Ill. 307; *McEnery v. McEnery*, 110 Ia. 366, 80 N. W. R. 1071; *Sill v. Sill*, 31 Kan. 248, 1 Pac. R. 556; *Kelly v. Saltmarsh*, 146 Mass. 586, 16 N. E. R. 460.

66. *Desmond v. McNamara*, 107 Wis. 126, 82 N. W. R. 701; *Chaplin v. Baker*, 124 Ind. 385, 24 N. E. R. 233.

67. *Rooney v. Koenig*, 80 Minn. 483, 83 N. W. R. 399.

68. *Uihlein v. Mathews*, 172 N. Y. 154, 64 N. E. R. 792; *Dye v. Thompson*, 126 Mich. 597, 85 N. W. R. 1113.

69. *Peugh v. Davis*, 96 U. S. 332, 336.

introduce parol evidence to show that a deed absolute on its face was meant by the parties to be a mortgage. As said by Sherwood, J., "The doctrine that a deed absolute on its face may be shown to be a mortgage is old and well established."⁷⁰ And it has been held that parol evidence is admissible to show that an absolute transfer of shares of stock, even when the transfer was recorded on the books of the corporation, was meant by the parties merely as a pledge or security for a loan.⁷¹ But parol evidence is inadmissible to prove an oral agreement to refund the purchase money in the event of a failure of the title in the case of a *quitclaim* deed.⁷²

§ 58. Admissibility of parol evidence in suits for cancellation or reformation of documents, or for specific performance.—In suits for cancelling or reforming a document the parol evidence rule does not apply. Parol evidence is admissible in such cases to show fraud,⁷³ or mutual mistake,⁷⁴ even in cases where the statute of frauds requires that the transaction be reduced to writing.⁷⁵ And parol evidence is also admissible in suits for specific performance to show that the writing does

70. *McMillan v. Bissell*, 63 Mich. 66.

71. *Brick v. Brick*, 98 U. S. 514.

72. *Putnam v. Russell*, 86 Mich. 389, 49 N. W. R. 147.

73. *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. R. 241; *Bennett v. Mass. Mut. L. Ins. Co.*, 107 Tenn. 371, 64 S. W. R. 758; *Barfield v. So. Side Irr. Co.*, 111 Cal. 118, 43 Pac. R. 406.

74. *Gill v. Pelky*, 54 Ohio St. 348, 43 N. E. R. 991; *Kee v. Davis*, 137 Cal. 456, 70 Pac. R. 294.

75. *McLennan v. Johnston*, 60 Ill. 306.

not express the real agreement of the parties.⁷⁶ It has been held, however, that in a suit for specific performance a court of equity will not admit parol evidence to reform the instrument and then decree the execution of it after it has been reformed.⁷⁷

§ 59. Weight and sufficiency of parol evidence.

—As a general rule, when parol evidence is introduced to vary or contradict a writing, to be effectual it must amount to more than merely a preponderance of the evidence.⁷⁸ Thus, where it is introduced to show fraud or mistake, in a suit to reform a document, the evidence must be positive and unequivocal.⁷⁹ And also where it is introduced to show that a deed absolute on its face was intended to operate as a mortgage,⁸⁰ or establish a trust, either in real estate,⁸¹ or personal property.⁸²

76. *Esper v. Wilson*, 190 Ill. 629, 60 N. E. R. 923; *Herren v. Rich*, 95 N. C. 500.

77. *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133.

78. *In re Sutch*, 201 Pa. St. 305, 50 Atl. R. 943; *Vignus v. O'Bannon*, 118 Ill. 334, 8 N. E. R. 778; *Jenkins v. Matthews*, 80 Ala. 486, 2 So. R. 518.

79. *Stanley v. Marshall*, 206 Ill. 20, 69 N. E. R. 58; *Sauer v. Nehls*, 121 Ia. 184, 96 N. W. R. 759; *Habbe v. Viele*, 148 Ind. 116, 45 N. E. R. 783, 47 N. E. R. 1; *Keith v. Woodruff*, 136 Ala. 443, 34 So. R. 911.

80. *Worley v. Dryden*, 57 Mo. 226; *Knowles v. Knowles*, 86 Ill. 1; *Wilde v. Howman*, 58 Neb. 634, 79 N. W. R. 546.

81. *Moore v. Wood*, 100 Ill. 451; *Dailey v. Dailey*, 125 Mo. 96, 28 S. W. R. 330; *Miller v. Miller*, 100 Mich. 563, 59 N. W. R. 242; *Braun v. First Ger. Evan. Luth. Church*, 198 Pa. St. 152, 47 Atl. R. 963.

82. *Allen v. Withrow*, 110 U. S. 119, 3 S. Ct. 517, 28 L. Ed. 90.

PART V.

Witnesses.

CHAPTER I.

Competency.

§ 1. **Definition.**—A witness, in the legal sense, is a person who gives evidence in a cause before a court. And a competent witness is a person who is legally qualified to do so.

§ 2. **Testing the competency of a witness.**—To test the competency of a witness the adverse counsel is entitled to have him examined before he is sworn.¹ He may, however, bring out the fact of his incompetency on cross-examination and have the testimony expunged.² Where a witness is competent to testify as to some matters and not as to others his testimony as to the latter should be excluded by objecting to improper questions.³ Mr. Best says, "A witness is said to be competent to give evidence when the judge is bound, as a matter of law, to reject his testimony, either generally or on some particular subject. In all other cases, it is to be received and its credibility weighed by the jury."⁴

1. Seeley v. Engell, 13 N. Y. 542.

2. Loveridge v. Hill, 96 N. Y. 222; R. v. Whitehead, L. R. 1 C. C. R. 33.

3. Beal v. Finch, 11 N. Y. 128.

4. Best on Evid. (10th ed.), §132. See also, 26 Am. Law Rev. 821; 9 Har. Law Rev. 1.

§ 3. Incompetent witnesses at common law.—

The following classes of persons were incompetent witnesses at the common law: (1) Parties to the record. (2) Real parties in interest although not parties to the record. (3) Persons wanting in capacity or understanding. (4) Persons who had been convicted of infamous crimes. (5) Persons whose religious belief was insufficient.

§ 4. Same. Husband and wife.—On grounds of public policy a few other classes of persons were incompetent witnesses at common law. Thus, as an almost universal rule, a husband or wife of a party to a suit was incompetent to testify either for or against the other spouse.⁵ Moreover, where the interests of either spouse were directly involved, and the verdict would directly conclude the party, the other spouse was an incompetent witness, although neither was a party to the suit.⁶ In a criminal case, however, against one spouse for personal injuries to the other, the injured spouse was a competent witness.⁷ But

5. *Hayes v. Parmalee*, 79 Ill. 563; *Lisman v. Early*, 12 Cal. 282; *Wilson v. Sheppard*, 28 Ala. 623; *Seargent v. Seward*, 31 Vt. 509; *Warner v. Press Pub. Co.*, 132 N. Y. 181; *Hopkins v. Grimshaw*, 165 U. S. 342.

6. *Craig v. Miller*, 133 Ill. 300; *Young v. Gilman*, 46 N. H. 484.

7. *People v. Selring*, 66 Mich. 705, 45 Am. Rep. 412; *Com. v. Sapp*, 90 Ky. 580, 14 S. W. R. 834, 29 Am. St. Rep. 805 (abortion by violence); *Goodwin v. State*, 114 Wis. 318, 90 N. W. R. 170 (assault with intent to kill); *Hills v.*

in criminal cases generally; as well as in civil cases, neither spouse was a competent witness either for or against the other.⁸ On the grounds of morality and decency neither spouse was a competent witness to testify to non-access during coverture.⁹ Not only were the spouses incompetent to give *direct* testimony on this point, but also as regards circumstantial evidence.¹⁰ Moreover, the death of one of the spouses did not render the other spouse competent to give evidence on this point.¹¹ Either spouse, however, was competent to testify to the fact that a child of the wife was born before or after marriage.¹² And on the question of the legitimacy of a child declarations and conduct of the wife,¹³ as well as of her paramour,¹⁴ were admissible. Moreover, on the ground of necessity, the wife was a competent witness in a bastardy case to the alleged criminal intercourse.¹⁵ Also where her husband

State, 61 Neb. 589, 85 N. W. R. 836 (bigamy); Clarke v. State, 117 Ala. 1, 23 So. R. 671, 67 Am. St. Rep. 157.

8. State v. Woodrow, 58 W. Va. 527, 52 S. E. R. 545, 112 Am. St. Rep. 1001, 2 L. R. A. (N. S.) 862 and note; State v. Willis, 119 Mo. 485; People v. Gordon, 100 Mich. 518. See also, note 106 Am. St. Rep. 763.

9. Boykin v. Boykin, 70 N. C. 262; Chamberlain v. People, 23 N. Y. 85; Goodright v. Moss, 2 Cowp. 591.

10. R. v. Sourton, 5 A. & E. 180.

11. R. v. Kea, 11 East, 132.

12. Goodright v. Moss, *supra*.

13. Aylesford v. Peerage, 11 App. Cas. 1.

14. Burnaby v. Bailie, 42 Ch. D. 282.

15. Evans v. State, 165 Ind. 369, 74 N. E. R. 244. See also, note 2 L. R. A. (N. S.) 619.

was charged with abandonment,¹⁶ bigamy,¹⁷ attempt to poison her,¹⁸ or abortion by violence.¹⁹ But neither spouse was a competent witness where the other spouse was charged with adultery.²⁰ Where one spouse was indicted for personal injuries to the other spouse the injured party might be *compelled* to testify.²¹ And where the wife was indicted for a crime, and her defense was coercion of her husband, she was a competent witness to testify on this point.²²

§ 5. **Statutes relating to competency of husband and wife.**—Both in England and in this country statutes have been enacted which have modified considerably the common-law rules relating to the competency of husband and wife. These statutes, however, are not at all harmonious. Some of them make the spouses competent witnesses both for and against each other

16. *State v. Brown*, 67 N. C. 470.

17. *United States v. Bassett*, 5 Utah, 131, 13 Pac. R. 237; *Hills v. State*, 61 Neb. 589, 85 N. W. R. 836.

18. *Com. v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 805; *People v. Northrup*, 50 Barb (N. Y.) 147.

19. *Navarro v. State*, 24 Tex. App. 378; *State v. Dyer*, 59 Mo. 303.

20. *State v. Jones*, 89 N. C. 559; *People v. Hendrickson*, 53 Mich. 525; *Cotton v. State*, 62 Ala. 121; *Crawford v. State*, 98 Wis. 623, 74 N. W. R. 537, 67 Am. St. Rep. 829; *Bassett v. United States*, 137 U. S. 496.

21. *Johnson v. State*, 94 Ala. 53; *Thiede v. Utah*, 159 U. S. 510.

22. *Beyerline v. State*, 147 Ind. 125, 45 N. E. R. 772. See also, notes 106 Am. St. Rep. 765; 27 Am. Dec. 377.

in particular cases.²³ While others, in a large measure at least, are declaratory of the common law.²⁴ In a few states the statutes practically abolish the restrictions of the common law. In these states a husband or wife may testify either for or against each other, except as to privileged communications between them.²⁵ Some statutes provide that the husband and wife may testify for or against each other where the subject matter of the action is the wife's separate estate.²⁶ And under these statutes it has been held that in an action by the wife for selling liquor to her husband,²⁷ or for slander,²⁸ malicious prosecution,²⁹ or per-

23. *Martin v. Derenbecker*, 116 La. 495, 40 So. R. 849; *Woodruff Hardware Co. v. Wender Blue Gem Coal Co.*, 141 Ky. 210, 132 S. W. R. 401; *Thomas v. State*, 155 Ala. 125, 46 So. R. 771; *Larson v. Carter*, 14 Idaho 511, 94 Pac. R. 825; *Brown v. Patterson*, 224 Mo. 639, 124 S. W. R. 1; *Rivers v. State*, 118 Ga. 42, 44 S. E. R. 859.

24. *Schreffler v. Chase*, 245 Ill. 395, 92 N. E. R. 272, 137 Am. St. Rep. 330; *Jenkins v. Lewis*, 25 Kan. 479; *Ex parte Beville*, 58 Fla. 170, 50 So. R. 685, 27 L. R. A. (N. S.) 273 and note, 19 Am. Cas. 48; *Canole v. Allen*, 222 Pa. St. 156, 70 Atl. R. 1053; *Grabowski v. State*, 126 Wis. 447, 105 N. W. R. 805; *Storey v. Veach*, 22 U. C. C. P. 164.

25. *Thompson v. Wadleigh*, 48 Me. 66; *State v. Reynolds*, 48 S. C. 384, 26 S. E. R. 679; *Richardson v. State*, 103 Md. 112, 63 Atl. R. 317; *Ex parte Beville*, *supra*.

26. *Grindle v. Grindle*, 240 Ill. 143, 88 N. E. R. 473; *Hana v. Barker*, 6 Colo. 303; *Turnley v. Texas Banking Co.*, 54 Tex. 451.

27. *Davenport v. Ryan*, 81 Ill. 218.

28. *Hawver v. Hawver*, 78 Ill. 412.

29. *Anderson v. Friend*, 71 Ill. 475.

sonal injuries,³⁰ her husband is a competent witness. But at common law the husband was incompetent to testify in a suit concerning his wife's separate estate.³¹ The statutes of the various states, and the federal statute, which render parties to a suit competent witnesses, do not effect the common-law rule respecting the disqualification of husband and wife as regards testifying for and against each other. Those statutes were not intended to apply to husband and wife.³² The New York Code of Civil Procedure provides that the marital relation shall not exclude the husband or wife from testifying where the suit is brought, prosecuted, opposed or defended on behalf of the other spouse.³³ Other statutes provide that both spouses are competent to testify either for or against each other where the issue between them is the title to property.³⁴

§ 6. Where husband or wife sues or is sued in a representative capacity.—When one of the spouses sues or is sued in a representative capacity the other spouse is a competent witness either for or against the one that sues or is sued.

30. *Rock Island v. Larkin*, 136 Ill. App. 579. But see *Martin v. Derenbecker*, *supra*; *Norfolk, etc., Ry. Co. v. Prindle*, 82 Va. 122.

31. *Storrs v. Storrs*, 23 Fla. 274, 2 So. R. 368; *Wilson v. Shepard*, 28 Ala. 623; *Galway v. Fullerton*, 17 N. J. Eq. 389.

32. *Lucas v. Brooks*, 18 Wall. (U. S.) 436.

33. § 828.

34. *Dowling v. Dowling*, 116 Mich. 346, 74 N. W. R. 523.

Thus, where a father sues on behalf of his child the plaintiff's wife is a competent witness.³⁵ This rule is also applicable where one of the spouses sues or is sued as administrator or administratrix, executor or executrix.³⁶ Where the husband is sued for necessities furnished his wife the latter is a competent witness.³⁷

§ 7. **Suits for divorce, criminal conversation or adultery.**—In a suit for an absolute divorce on the ground of adultery the defendant is a competent witness.³⁸ In an action for criminal conversation it has been held that the plaintiff's wife is not a competent witness in his behalf; and also that he is not a competent witness to testify to his wife's adultery.³⁹ But where the husband is indicted for conspiring to have his wife confined in an insane asylum the latter is a competent witness.⁴⁰ On the other hand, she is not a competent witness against him to prove his fraud.⁴¹ It has been held that in a prosecution for adultery

35. *Lapleine v. Morgan, etc., Ry., etc., Co.*, 40 La. Ann. 661, 4 So. R. 875, 1 L. R. A. 378.

36. *Gordon v. Sullivan*, 116 Wis. 543, 93 N. W. R. 457; *Van Fleet v. Stout*, 44 Kan. 523, 24 Pac. R. 960.

37. *Morganroth v. Spencer*, 124 Wis. 564, 102 N. W. R. 1086.

38. *Stevens v. Stevens*, 54 Hun (N. Y.) 490, 27 N. Y. State R. 602, 8 N. Y. Supp. 47.

39. *Reynolds v. Schaffer*, 91 Mich. 494; *Cornelius v. Hanbay*, 150 Pa. St. 359. *Contra*, *Smith v. Merrill*, 75 Wis. 461, 44 N. W. R. 759; *Smith v. O'Brien*, 127 N. Y. 684, 28 N. E. R. 256.

40. *Com. v. Spink*, 137 Pa. St. 255.

41. *Cornelius v. Hanbay*, *supra*.

the offense may not be proved by the husband or wife of the person with whom the defendant is alleged to have committed the offense.⁴² The contrary has been held, however, by several courts.⁴³ But the spouse of the person with whom the defendant is alleged to have committed the offense, is a competent witness to testify to his or her marriage to that person.⁴⁴ Where the defendant is sued for damages for alienating the affections of the spouse of the plaintiff, under some statutes both spouses are competent witnesses.⁴⁵ But in the absence of such statutes the contrary has been held.⁴⁶

§ 8. Joint action by or against one spouse and other persons.—In actions by or against one spouse and other persons jointly the other spouse is an incompetent witness.⁴⁷ But where

42. *People v. Fowler*, 104 Mich. 449, 62 N. W. R. 572; *Howard v. State*, 94 Ga. 587, 20 S. E. R. 426; *State v. Welch*, 26 Me. 30, 45 Am. Dec. 94.

43. *State v. West*, 118 Wis. 469, 95 N. W. R. 521, 99 Am. St. Rep. 1002; *Pruet v. State*, 141 Ala. 69, 37 So. R. 343; *State v. Wiseman*, 130 N. C. 726, 41 S. E. R. 884.

44. *People v. Isham*, 109 Mich. 72, 67 N. W. R. 819.

45. *Coy v. Humphreys*, 142 Mo. App. 92, 125 S. W. R. 877; *Roësner v. Darrah*, 65 Kan. 599, 70 Pac. R. 597.

46. *Frätini v. Caslini*, 66 Vt. 273, 29 Atl. R. 252, 44 Am. St. Rep. 843; *Rice v. Rice*, 104 Mich. 371, 62 N. W. R. 833.

47. *Gillespie v. People*, 176 Ill. 238, 52 N. E. R. 250; *Holley v. State*, 105 Ala. 100, 17 So. R. 102; *Arn v. Mathews*, 39 Kan. 272, 18 Pac. R. 65; *Henning v. Stevenson*, 118 Ky. 318, 80 S. W. R. 1135; *Bartlet v. Clough*, 94 Wis. 196, 68 N. W. R. 875; *Cook v. Neely*, 143 Mo. App. 632, 128 S. W. R. 233.

the action has been dismissed as to the spouse who is a codefendant with the others,⁴⁸ or where judgment has been rendered as to him or her, the other spouse is a competent witness for or against the other co-defendants.⁴⁹ In a criminal case, however, where one of the spouses is a codefendant and the defendants are tried jointly the other spouse is an incompetent witness either for or against any of the defendants.⁵⁰ But the mere fact that one of the spouses is a *particeps criminis* does not render the other spouse an incompetent witness.⁵¹

§ 9. One spouse a subscribing witness to a will.—Where one spouse is a subscribing witness to a will in which the other spouse is a legatee the former is a competent witness in support of the validity of the will, even when a statute expressly provides that the spouses are incompetent to testify for or against each other.⁵² It has been held, however, that, in a proceeding to contest the validity of a will, the spouse of an heir

48. *Van Valkenburg v. Lynde* (Kan.), 66 Pac. R. 994; *Rios v. State*, 39 Tex. Cr. R. 675, 47 S. W. R. 987.

49. *Singer Mfg. Co. v. Howes* (Ky.), 49 S. W. R. 963, 20 Ky. L. Rep. 1607.

50. *Graff v. People*, 208 Ill. 312, 70 N. E. R. 209; *Smith v. Com.*, 90 Va. 759, 19 S. E. R. 843; *Rivers v. State*, 118 Ga. 42, 44 S. E. R. 859; *Newman v. State*, 160 Ala. 102, 49 So. 786.

51. *Burns v. State* (Tex.), 66 S. W. R. 303.

52. *Lanning v. Gay*, 70 Kan. 353, 78 Pac. R. 810, 85 Pac. R. 407.

of the testator is an incompetent witness where the other spouse is a party to the suit.⁵³

§ 10. **One spouse agent of the other.**—Where a husband or wife acts as agent of the other spouse he or she is a competent witness.⁵⁴ And the death of the principal in such case does not render the agent incompetent.⁵⁵ But the death of the third party with whom the agent deals renders both husband and wife incompetent.⁵⁶ The fact that a tort is committed in the wife's presence against her husband in his absence does not render the wife a competent witness.⁵⁷ The rule which makes one spouse a competent witness for the other on the ground of agency is confined to *business transactions* with third persons.⁵⁸ But where one spouse assumes to act as the agent of the other spouse without authority the rule does not apply.⁵⁹ The mere signing of her husband's name at his request owing to his

53. *Henning v. Stevenson*, 118 Ky. 318, 80 S. W. R. 1135, 26 Ky. L. Rep. 159.

54. *Green v. McCracken*, 64 Kan. 330, 67 Pac. R. 857; *Armstrong v. Crump*, 25 Okla. 452, 106 Pac. R. 855; *Pain v. Farson*, 179 Ill. 185, 53 N. E. R. 579; *Turner v. Overall*, 172 Mo. 271, 72 S. W. R. 644.

55. *Reed v. Crissey*, 63 Mo. App. 184; *Robnet v. Robnet*, 43 Ill. App. 191.

56. *Sanborn v. Cole*, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

57. *Bunker v. Bennett*, 103 Mass. 516.

58. *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. R. 405; *Orchard v. Collier*, 171 Mo. 300, 71 S. W. R. 677.

59. *Case v. Colter*, 66 Ind. 336.

illiteracy does not render her a competent witness.⁶⁰

§ 11. **Indictment of one spouse for injury to the other spouse.**—Where one spouse is indicted for violence to the other spouse the injured party is a competent witness.⁶¹ The prosecution, however, may not be compelled to call the injured spouse as a witness, but in case of refusal the defendant may do so.⁶² Where the husband is on trial for an indecent assault on his daughter the wife is an incompetent witness.⁶³ Where a divorced husband is on trial for attempting to poison his wife during coverture the divorced wife is a competent witness.⁶⁴ And where the husband is on trial for forcible abduction and marriage the wife is a competent witness.⁶⁵

§ 12. **Statutory modifications.**—Both in England and in this country statutes have been passed enlarging the scope of the competency of husband and wife to testify for and against each other. These statutes, however, are not at all harmonious.⁶⁶ Hence the necessity of examining the laws of the forum in regard to this question. Under the English statutes both spouses are

60. *Fishback v. Harrison*, 137 Mo. App. 664, 119 S. W. R. 465.

61. *Miller v. State*, 78 Neb. 645, 111 N. W. R. 637; *Murray v. State*, 48 Tex. Cr. R. 141, 86 S. W. R. 1024.

62. *People v. Fitzpatrick*, 5 Park. Cr. R. (N. Y.) 26.

63. *People v. Westbrook*, 94 Mich. 629, 54 N. W. R. 486.

64. *Com. v. Sapp*, 90 Ky. 580.

65. *Com. v. Hayden*, 163 Mass. 453; *Walker v. State*, 34 Fla. 167; *Hanselman v. Dovel*, 102 Mich. 505.

66. *Greenleaf on Evid.*, § 334.

generally, competent witnesses for or against each other in civil cases. Neither, however, may disclose confidential communications made between them during coverture.⁶⁷ This rule also obtains in this country. In a few jurisdictions, however, such communications are receivable in evidence provided the other spouse consents.⁶⁸ The California Code provides as follows: "A husband cannot be examined for or against his wife, without her consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or a proceeding by one against the other; nor to a criminal action or proceeding for a crime committed by one against the other."⁶⁹ This statute has been substantially adopted by a number of states. In the federal courts the laws of the state in which the court is held are applicable in civil cases.⁷⁰ But the federal statute upon this point has been held not to apply in criminal cases.⁷¹

§ 13. Persons lacking in understanding.—To be a competent witness a person must have suf-

67. Taylor on Evid. (10th ed.), § 1352.

68. Eaton v. Knowles, 61 Mich. 625; Wolford v. Farnham, 44 Minn. 159.

69. Cal. Code Civ. Proc., § 1881.

70. U. S. Rev. Stat., § 858, U. S. Comp. Stat. (1901) 659; Connecticut Ins. Co. v. Trust Co., 112 U. S. 250.

71. Logan v. United States, 144 U. S. 263.

ficient understanding. A person may lack in this respect because of insanity, idiocy, intoxication or youthfulness. An insane person, however, who realizes the nature and obligation of an oath and has sufficient understanding to observe accurately and state correctly what he observes is a competent witness.⁷² If he lacks understanding in either of these respects he is incompetent.⁷³ As said by Campbell, C. J., "The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath?"⁷⁴ And as said by Field, J., "The general rule, therefore, is that a lunatic or person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue."⁷⁵ See also, page 636, § 14.

§ 14 **Idiocy.**—Insanity is a *derangement* of the mind; whereas idiocy is a *defect* of mind. An idiot is a person who has never had a mind. From

72. Tucker v. Shaw, 158 Ill. 326, 41 N. E. R. 914; District of Columbia v. Armes, 107 U. S. 519, 521, 522.

73. Covington v. O'Meara, 133 Ky. 762, 119 S. W. R. 187; State v. Howard, 62 Minn. 474, 65 N. W. R. 63; District of Columbia v. Arms, *supra*.

74. Reg. v. Hill, 5 Cox Cr. Cas. 259.

75. District of Columbia v. Armes, *supra*; Sarbach v. Jones, 20 Kan. 497 (witness who was adjudged restored to sanity competent to testify to occurrences during guardianship).

birth he has never had "the least glimmering of reason, and is utterly destitute of all those intellectual faculties by which man, in general, is so eminently and peculiarly distinguished."⁷⁶ He is hopelessly incompetent to act as a witness. But it is said that "The testimony of either an idiot or a lunatic may, however, be received, if he appears to the court to have sufficient understanding to comprehend the obligation of an oath, and to be able to give correct answers to the questions put."⁷⁷ An *idiot*, however, has no mind to comprehend the obligation of an oath, and therefore is not a competent witness in any case.

§ 15. Competency of deaf and dumb persons.—A deaf and dumb person was formerly presumed an idiot and therefore an incompetent witness.⁷⁸ This view, however, no longer obtains. He is a competent witness, and may communicate his knowledge either by writing or by signs. The mode of doing so rests in the discretion of the trial court.⁷⁹ For further discussion of this topic see page 631, § 9.

§ 16. Competency of drunken persons.—Drunken persons are not necessarily incompetent witnesses. But it is said that "A person in

76. *Coleman v. Com.*, 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

77. *Jones on Evid.*, § 719 (737).

78. 1 Hale P. C. 34. See note, 24 L. R. A. 126.

79. *The State v. Howard*, 118 Mo. 127, 143, 144, 24 S. W. R.

41. See also, 5 Am. and Eng. Encyc. of Law 119, and cases cited; *Taylor on Evid.* (10th ed.), § 1376, and note.

a state of intoxication is incompetent.”⁸⁰ This statement, however, is altogether too broad. A person who is so excessively intoxicated as to be incapable of understanding the obligation of an oath, or of giving a correct account of the matters he has seen or heard in reference to the questions at issue, is an incompetent witness and should be excluded.⁸¹ But the mere fact that a person is intoxicated does not render him an incompetent witness.⁸² Nor does the fact of habitual drunkenness.⁸³

§ 17. Competency of persons under the influence of drugs.—The fact that a person is under the influence of a stupifying drug does not necessarily render him an incompetent witness.⁸⁴ It depends upon the excessiveness of his stupidity. As in the case of the use of alcoholic liquors, the question is one which rests in the sound discretion of the trial court. It has been held that a person may be a competent witness who at the time of the occurrence was so thoroughly stupi-

80. Bradner on Evid. (2d. ed.), § 7, p. 138.

81. *Hartford v. Palmer*, 16 Johns. (N. Y.) 143.

82. *Eskridge v. State*, 25 Ala. 33; *State v. Sejours*, 113 La. 676, 37 So. R. 599; *Meyers v. State*, 37 Tex. Cr. R. 208, 39 S. W. R. 111; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. R. 164.

83. *Gebhart v. Shindle*, 15 Serg. & R. (Pa.) 235; *Thayer v. Boyle*, 30 Me. 475.

84. *State v. White*, 10 Wash. 611, 39 Pac. R. 160, 41 Pac. R. 442; *Pones v. State*, 43 Tex. Cr. R. 201, 63 S. W. R. 1021.

fied by drugs that he did not realize until afterward what had happened.⁸⁵

§ 18. **Competency of imbeciles.**—The competency of imbeciles to act as witnesses is a question upon which the decisions are not harmonious. Thus, it has been held in a prosecution for rape upon an imbecile that the victim was a competent witness against the defendant, although her imbecility of mind prevented effectual resistance.⁸⁶ While, on the other hand, it has been held that the prosecutrix was an incompetent witness where the indictment alleged that she was so mentally diseased as to render her incapable of successfully opposing the act of carnal knowledge.⁸⁷

§ 19. **Competency of children.**—At common law there is no fixed age of demarcation between competency and incompetency.⁸⁸ The test is intelligence.⁸⁹ The question is, has the child sufficient intelligence to grasp the facts of the case and to state them correctly, and to realize the

85. *Pones v. State*, *supra*.

86. *State v. Crouch*, 130 Ia. 478, 107 N. W. R. 173. See also, *State v. Simes*, 12 Idaho 310, 85 Pac. R. 914, 9 Ann. Cas. 1216 and note.

87. *Lee v. State*, 43 Tex. Cr. R. 285, 64 S. W. R. 1047.

88. *Shannon v. Swanson*, 208 Ill. 52, 69 N. E. R. 869; *State v. Tolla*, 72 N. J. L. 515, 62 Atl. R. 675, 3 L. R. A. N. S. 523; *Wheeler v. United States*, 159 U. S. 523, 524 (boy nearly 5½ years old competent).

89. *State v. King*, 117 Ia. 484, 91 N. W. R. 768; *Teatherstone v. People*, 194 Ill. 325, 62 N. E. R. 684; *Merchant v. Com.*, 140 Ky. 12, 130 S. W. R. 793.

sanctity of an oath.⁹⁰ As in other cases of the competency of witnesses, the question is one which rests in the sound discretion of the court.⁹¹ For further discussion of this topic see page 633, § 12.

§ 20. **Competency of persons not of the Caucasian race.**—Under the modern rule, race or color does not render a person an incompetent witness.⁹² Formerly, restrictions were placed upon the competency of negroes and mulattoes.⁹³ And in California upon the competency of Chinese.⁹⁴ But these restrictions have been abrogated by statute. Today, negroes,⁹⁵ Chinese,⁹⁶ Japanese⁹⁷ and Indians⁹⁸ are competent witnesses.

90. *Com. v. Ramage*, 177 Mass. 349, 58 N. E. R. 1078; *Clinton v. State*, 53 Fla. 98, 43 So. R. 312, 12 Ann. Cas. 150; *State v. Douglas*, 53 Kan. 669, 37 Pac. R. 172; *Com. v. Wilson*, 186 Pa. St. 1, 40 Atl. R. 283; *Bright v. Com.*, 120 Ky. 298, 86 S. W. R. 527, 117 Am. St. Rep. 590; *Walker v. State*, 134 Ala. 86, 32 So. R. 703.

91. *State v. Headley*, 224 Mo. 177, 123 S. W. R. 577; *State v. Gregory*, 148 Ia. 152, 126 N. W. R. 1109; *Crosby v. State*, 93 Ark. 156, 124 S. W. R. 781, 137 Am. St. Rep. 80.

92. *State v. Underwood*, 63 N. C. 98; *Clarke v. State*, 35 Ga. 75.

93. *Grady v. State*, 11 Ga. 253; *Smith v. Oliver*, 31 Ala. 39; *Jordon v. Smith*, 14 Ohio 199; *Graham v. Crockett*, 18 Ind. 119.

94. *People v. McGuire*, 45 Cal. 56.

95. *Kelley v. State*, 25 Ark. 392.

96. *State v. Lu Sing*, 34 Mont. 31, 85 Pac. R. 521, 9 Ann. Cas. 344.

97. *Pumphrey v. State*, 84 Neb. 636, 122 N. W. R. 19, 23 L. R. A. N. S. 1023, 18 Ann. Cas. 979 and note.

§ 21 **Lack of religious belief.**—At the English common law an atheist was an incompetent witness.⁹⁹ And according to Lord Coke an infidel was an incompetent witness.¹⁰⁰ Lord Coke's rule, however, has been severely criticised. As said by Scates, C. J., "In early times Lord Coke laid down the rule as excluding all not Christians—a rule as narrow, bigoted and inhuman as the spirit of fanatical intolerance and persecution which disgraced his age and country."¹ This narrow rule soon became obsolete. The leading English case on the subject is *Omičhund v. Barker*.² In this case the court held that natives of the East Indies professing the Gentoo religion and belief in a God and in future punishment for wrongdoing were competent witnesses in an English court. It has been held in this country that a believer in God, but who did not believe in a future state of rewards and punishments based upon conduct while on earth was an incompetent witness.³ But many courts have held that a person who believes in the existence of a Supreme Being, and future rewards and punishments even on this earth, is a competent wit-

98. 22 Cyc. 115 (Indians).

99. *Atwood v. Welton*, 7 Conn. 66; *Smith v. Coffin*, 18 Me. 157; *Scott v. Hooper*, 14 Vt. 535.

100. 7 Coke, 17. b.

1. *Central Military Tract. Ry. Co. v. Rockafellow*, 17 Ill. 541.

2. *Willes* 538, 1 Atk. 21, 49 (1744).

3. *Curtiss v. Strong*, 4 Day (Conn.) 51, 4 Am. Dec. 179.

ness.⁴ Moreover, by constitutional or statutory provisions in many states the requirement of religious belief has been eliminated altogether.⁵ See also, page 632, § 10.

§ 22. **Oath or affirmation still essential.**—Although the religious test has been abolished in many jurisdictions, an oath, or its equivalent, is still essential in all jurisdictions.⁶ The mode which the witness deems most obligatory should be adopted. As said by Lord Stairs, "It is the duty of judges in taking the oaths of witnesses to do it in those forms that will most touch the conscience of the swearers according to their persuasion and custom; and though Quakers and fanatics deviating from the common sentiments of mankind refuse to give a formal oath, yet if they do that which is materially the same, it is materially an oath."⁷ Thus, a Quaker may qualify by solemnly asserting that he will speak

4. Blair v. Seaver, 26 Pa. St. 274; Beeson v. Moore, 132 Ala. 391, 31 So. R. 456; Brock v. Milligan, 10 Ohio 121; Hunscom v. Hunscom, 15 Mass. 184; Shaw v. Moore, 49 N. C. 25.

5. State v. Williams, 111 La. 179, 35 So. R. 505; State v. King, 117 Ia. 484, 91 N. W. R. 768; Hronek v. People, 134 Ill. 139, 24 N. E. R. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837; Dickinson v. Beal, 10 Kan. App. 233, 62 Pac. R. 724; People v. Copsey, 71 Cal. 548; Bush v. Com., 80 Ky. 244; Clinton v. State, 53 Fla. 98, 43 So. R. 312, 12 Ann. Cas. 150 and note.

6. Priest v. State, 10 Neb. 393.

7. Institutes of the Laws of Scotland 692.

the truth;⁸ a Chinese by killing a cock, or breaking a saucer, and declaring that, if he speaks falsely, his soul will be similarly dealt with;⁹ a Jew by taking the oath on the Pentateuch with covered head;¹⁰ a Mohametan by taking the oath on the Koran;¹¹ a Roman Catholic by taking the oath on the Holy Evangelists;¹² a Gentoo by touching the foot of a Brahmin (or priest).¹³ Willfully testifying falsely under any of the foregoing circumstances constitutes perjury.¹⁴

§ 23. **Persons convicted of infamous crimes.**—

At common law a person who had been convicted of an *infamous* crime, and who had not been pardoned, was an incompetent witness.¹⁵ Infamous crimes comprise treason, felonies and those crimes that come within the scope of *crimen falsi*.¹⁶ The meaning of the term *crimen falsi* is somewhat vague. As said by Mr. Bradner, "the meaning of the term *crimen falsi*, in our law, is nowhere

8. *United States v. Coolridge*, 2 Gall. (U. S.) 364; *Atkinson v. Everett*, Cowp. 382.

9. *R. v. Enthelman*, Car. & M. 248.

10. *Omychund v. Barker*, *supra*.

11. *Morgan's Case*, 1 Leach Cr. Cas. 54.

12. *Com. v. Buzzell*, 16 Pick. (Mass.) 153.

13. *Omychund v. Barker*, *supra*.

14. *Sells v. Hoare*, 3 Brod. & B. 232. See also note, 92 Am. Dec. 473.

15. *Com. v. Gorham*, 99 Mass. 420; *State v. Clark*, 60 Kan. 450, 56 Pac. R. 767; *Taylor v. State*, 62 Ala. 164; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218.

16. *United States v. Sims*, 161 Fed. R. 1008.

laid down with precision."¹⁷ It has been held that a crime to come within the term must not only contain the element of falsehood, but also tend to obstruct justice.¹⁸ Boggs, J., says, "*Crimen falsi*, according to the better opinion, does not include all offenses which involve a charge of untruthfulness, but only such as injuriously affect the administration of justice, such as perjury, subordination of perjury, suppression of testimony by bribery or conspiracy to procure the absence of a witness, or to accuse one wrongfully of a crime, or barratry, or the like."¹⁹

It has been held that a person who has been convicted of burglary;²⁰ arson;²¹ rape;²² larceny;²³ forgery;²⁴ or receiving stolen goods,²⁵ is an incompetent witness at common law. On the other hand, it has been held that a person who has been convicted of keeping a bawdy house;²⁶ illegally selling intoxicating liquors;²⁷

17. Bradner on Evid. 140.

18. United States v. Sims, *supra*.

19. Martzenbaugh v. The People, 194 Ill. 108, 113. See also, 16 Am. & Eng. Ency. of Law (2d ed.) 246, 247.

20. People v. Park, 41 N. Y. 21.

21. Harrison v. State, 55 Ala. 239.

22. State v. Turner, Houst. Cr. Cas. (Del.) 76.

23. Com. v. Keith, 8 Metc. (Mass.) 531; Taylor v. State, 62 Ala. 164.

24. Webster v. Mann, 56 Tex. 119, 42 Am. Rep. 688.

25. Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458. *Contra*, Com. v. Murphy, 3 Pa. L. J. 290.

26. Deer v. State, 41 Mo. 348.

27. Cabrera v. State, 56 Tex. Cr. R. 141, 118 S. W. R. 1054.

illegally disposing of mortgaged crops;²⁸ obtaining goods under false pretenses;²⁹ embezzlement;³⁰ violating a municipal ordinance;³¹ or obstructing railroad tracks,³² is not thereby rendered an incompetent witness at common law.

It has been held that testimony given at a former trial by a person who has since been convicted of an infamous crime is not admissible.³³

The mere fact that a person had confessed to the commission of an infamous crime did not render him an incompetent witness at common law. An actual conviction was essential. He must have been adjudged guilty of an infamous crime by a court of competent jurisdiction.³⁴ A verdict of guilty was not in itself sufficient. It must have been followed by a judgment.³⁵

§ 24. Same. Conviction in a sister state.—

The fact that a person had been convicted of an infamous crime in a sister state, or in a foreign country, did not render him an incompetent wit-

28. *State v. Green*, 48 S. C. 136, 26 S. E. R. 234.

29. *Uteley v. Merrick*, 11 Metc. (Mass.) 302.

30. *Planters', etc., Ins. Co. v. Tunstall*, 72 Ala. 142.

31. *Burns v. Campbell*, 71 Ala. 271.

32. *Clifton v. State*, 73 Ala. 473; *Com. v. Dame*, 8 Cush. (Mass.) 384.

33. *Le Baron v. Crombie*, 14 Mass. 234.

34. *Jones v. State*, 32 Tex. Crim. Rep. 135; *Blaufus v. People*, 69 N. Y. 107.

35. *Fay v. Harlan*, 128 Mass. 244; *Owen v. State*, 86 Ark. 317, 111 S. W. R. 466; *Deckard v. State*, 57 Tex. Cr. Rep. 359, 123 S. W. R. 417; *Faunce v. People*, 51 Ill. 311.

ness at common law.³⁶ As the disqualification was of a penal nature it was strictly construed.³⁷ But a person who had been convicted of an infamous crime in a state court was not competent to testify in a federal court within the state.³⁸

The fact that a witness has been convicted of a crime in any jurisdiction may be shown where the purpose in introducing the testimony is to impeach his credibility.³⁹ And the testimony in such case may relate to his conviction of *any* crime.⁴⁰

§ 25. Same. Mode of proving conviction.—At common law the only mode of proving the conviction is by the original record or a duly certified copy thereof.⁴¹ Oral evidence of the fact is inadmissible. And even an admission by the witness on his cross-examination is not suffi-

36. *Logan v. United States*, 144 U. S. 263; *State v. Landrum*, 127 Mo. App. 653, 106 S. W. R. 1111; *Com. v. Green*, 17 Mass. 515.

37. *Campbell v. State*, 23 Ala. 44; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632.

38. *United States v. Hall*, 53 Fed. R. 352.

39. *Com. v. Knapp*, 9 Pick. (Mass.) 496.

40. *Cheatham v. State*, 59 Ala. 40 (violating a city ordinance); *Utley v. Merrick*, 11 Metc. (Mass.) 302 (false pretenses); *Little v. Gibson*, 39 N. H. 505 (adultery); *Deer v. State*, 14 Mo. 348 (keeping a bawdy house); *Holloway v. Com.*, 11 Bush. (Ky.) 344 (dealing faro); *Schuylkill v. Copeley*, 67 Pa. St. 386 (embezzlement); *Gage v. Eddy*, 167 Ill. 108.

41. *Com. v. Gallagher*, 126 Mass. 54; *Johnson v. State*, 48 Ga. 116.

cient⁴² By statutory provisions, however, in some states, including Illinois, conviction may be shown by oral testimony, including admissions of the witness on his cross-examination.⁴³ And in the case of the cross-examination the party who cross-examines the witness is not concluded by his answers.

§ 26. **Effect of a pardon or a reversal of the judgment.**—The effect of a pardon, or a reversal of the judgment, is to remove the disability.⁴⁴ Moreover, it is immaterial that the party acquires knowledge of the facts, concerning which he is called upon to testify, after his conviction and before the pardon is granted, or the judgment reversed.⁴⁵ To remove the disability the pardon must be absolute.⁴⁶ An act of executive clemency which merely restores citizenship does not remove the disability of incompetency to act as a witness.⁴⁷ Nor does a mere remission of the penalty.⁴⁸ Pending an appeal from the convic-

42. *Vance v. State*, 70 Ark. 272, 68 S. W. R. 37; *Boyd v. State*, 94 Tenn. 505, 29 S. W. R. 901.

43. *Gage v. Eddy*, *supra*.

44. *Yarborough v. State*, 41 Ala. 405; *Hester v. Com.*, 85 Pa. St. 154; *Singleton v. State*, 38 Fla. 297, 21 So. R. 21, 56 Am. St. Rep. 177, 34 L. R. A. 251; *State v. Kelleher*, 224 Mo. 145, 123 S. W. R. 551, 19 Ann. Cas. 1270; *Boyd v. United States*, 142 U. S. 450.

45. *Thornton v. State*, 20 Tex. App. 519.

46. *McGee v. State*, 29 Tex. App. 596.

47. *People v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148.

48. *State v. Kirschner*, 23 Mo. App. 349; *Perkins v. Stevens*, 24 Pick. (Mass.) 277.

tion the disqualification continues.⁴⁹ Some courts, however, hold the contrary.⁵⁰

§ 27. Effect of serving out the sentence.—Whether serving out the sentence removes the disability or not is a question upon which the decisions are not harmonious. Mr. Jones says, "The weight of authority seems to hold that the disability is removed in this manner, but there are authorities that sanction the contrary view."⁵¹ On the other hand, it is said that "At common law the fact that the witness has served the full term of his sentence does not restore him to competency; but under some statutes one who has been fully punished—that is, who has served his sentence or paid his fine—is restored to competency."⁵² In Texas, Virginia, Pennsylvania and Maryland it has been held that serving out the sentence removes the disability;⁵³ while in Louisiana it has been held that it does not.⁵⁴

49. *State v. Harris*, 22 Wash. 57, 60 Pac. R. 58; *Ritter v. Democratic Press Co.*, 68 Mo. 458.

50. *Stanley v. State*, 39 Tex. Cr. Rep. 482, 46 S. W. R. 645.

51. *Jones on Evidence*, § 718 (736).

52. 40 Cyc. 2208.

53. *Carr v. Smith*, 19 Tex. App. 635, 53 Am. Dec. 395; *Quillin v. Com.*, 105 Va. 874, 54 S. E. R. 333 (in this case the witness had not been fully punished); *United States v. Hughes*, 175 Fed. R. 238 (under Penn. stat.); *Cole v. Cole*, 1 Harr. & J. (Md.) 572. See also, *United States v. Hall*, 53 Fed. R. 352.

54. *State v. Benoid*, 16 La. Ann. 273. See also, *United States v. Brown*, 4 Cranch C. C. 607, 24 Fed. Cas. No. 14, 661.

Where the disability is imposed by statute an absolute pardon does not remove the disability.⁵⁵

§ 28. **Statutory modifications and abrogations.**

—In most of the jurisdictions of this country the disqualification caused by conviction of an infamous crime has been abrogated by statute; while in other jurisdictions it has been considerably modified.⁵⁶ As a general rule, however, conviction may be shown where the purpose is to *impeach the credibility* of the witness.⁵⁷

§ 29. **Parties to the record.**—At the English common law a party to an action at law or a suit in equity was generally held incompetent to testify.⁵⁸ The chief basis of the rule was interest of the party in the outcome of the trial. A mere nominal party, with no pecuniary interest in the case, and who was under no liability for costs, was held competent to testify.⁵⁹ But the mere

55. *Evans v. State*, 7 Baxt. (Tenn.) 12; *Foreman v. Baldwin*, 24 Ill. 298.

56. *Stone v. State*, 118 Ga. 705, 45 S. E. R. 630, 98 Am. St. Rep. 145; *State v. Myers*, 198 Mo. 225, 94 S. W. R. 242; *Wynne v. State*, 155 Ala. 99, 46 So. R. 459; *Dotterer v. State*, 172 Ind. 357, 88 N. E. R. 689, 30 L. R. A. N. S. 846; *State v. Dalton*, 20 R. I. 114, 37 Atl. R. 673; *Wells v. Territory*, 15 Okl. 195, 81 Pac. R. 425; *Hopt v. People*, 110 U. S. 574.

57. *People v. Chapleau*, 121 N. Y. 266.

58. *Fenn v. Granger*, 3 Campb. 177; *Binney v. Merchant*, 6 Mass. 190; *Johnson v. Cox*, 12 Ind. 362; *Norris v. Johnston*, 5 Pa. St. 287; *Lucas v. Spencer*, 27 Ill. 15; *White v. Dow*, 23 Vt. 300.

59. *Hale v. Meegan*, 39 Mo. 272; *Talbot v. Talbot*, 23 N. Y. 17; *Paine v. Tilden*, 20 Vt. 554; *Rice v. Rice*, 108 Ill. 199.

fact that he would be liable for costs if the judgment should be adverse to him rendered him incompetent.⁶⁰ While the application of the rule may have been somewhat less rigid in courts of chancery than in courts of law,⁶¹ yet, generally speaking, it was applied in both classes of courts. As said by Walker, C. J., "The practice, however, in a court of chancery has never authorized the complainant to testify in his own behalf any more than at law."⁶² On the other hand, one of the familiar rules of chancery procedure is that an answer that is strictly responsive to the bill is treated as evidence in the case.⁶³ Moreover, as said by Mr. Best, "when an issue was directed from a court of chancery to be tried in a court of law it was frequently made part of the order that the plaintiff or defendant should be examined as a witness."⁶⁴

§ 30. **Same. Exceptions to the rule.**—On the ground of necessity there were several well recognized exceptions to the rule that a party to the record was an incompetent witness. Thus, where a party to the record was the only person who had knowledge of certain preliminary facts,

Contra, *Canty v. Sumter*, 2 Bay (S. C.) 93; *Sears v. Dillingham*, 12 Mass. 358.

60. *Whitmore v. Wilks*, 3 Car. & P. 364; *Rex v. St. Mary Mary Magdalen*, 3 East 7.

61. *Foote v. Silsby*, 3 Blatch. (U. S.) 507.

62. *Mixell v. Lutz*, 34 Ill. 382, 388.

63. *Clark v. Van Riemsdyck*, 9 Cranch (U. S.) 153.

64. *Best on Evid.* (10th ed.), § 172.

such as the death of subscribing witnesses,⁶⁵ the loss of documents,⁶⁶ notice to produce certain documents,⁶⁷ etc., he was a competent witness to testify to such facts. Again, in actions against innkeepers and common carriers for the loss of baggage caused by fraudulent misconduct, or even negligence, of the defendant, the owner was a competent witness to prove his loss, provided no other evidence of the fact was obtainable.⁶⁸ Similarly, in actions for breach of trust, including embezzlement, the plaintiff was a competent witness to prove his loss where no other satisfactory evidence of this fact was obtainable.⁶⁹ Moreover, the exception was extended to cases where, on the ground of public necessity, it was essential to allow a party to the record to testify in the case in order to secure the due administration of justice.⁷⁰ Another exception to the rule was a party to the record could voluntarily testify on behalf of his adversary, but he could

65. *Moore v. Maxwell*, 18 Ark. 469; *Jackson v. Davis*, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451.

66. *Page v. Page*, 15 Pick. (Mass.) 374; *Patterson v. Winn*, 5 Peters, (U. S.) 233.

67. *Jordan v. Cooper*, 3 Serg. & R. (Pa.) 564.

68. *Clarke v. Spence*, 10 Watts (Pa.) 335; *Adams Exp. Co. v. Haynes*, 42 Ill. 90; *Harlow v. Fitchburg Ry. Co.*, 8 Gray (Mass.) 237.

69. *United States v. Clark*, 96 U. S. 41; *Herman v. Drinkwater*, 1 Me. 27; *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212.

70. *United States v. Murphy*, 16 Peters (U. S.) 203.

not be compelled to do so.⁷¹ On the other hand, where there were several plaintiffs or several defendants one of them could not testify on behalf of the adversary without the consent of his co-plaintiffs or co-defendants.⁷² In a criminal case the defendant was not a competent witness in his own behalf,⁷³ nor could he testify for or against a co-defendant,⁷⁴ unless the prosecution against himself had been terminated.⁷⁵

§ 31. **Same. Statutory provisions.**—By statutory provisions generally, both in England and in this country, parties to the record are made competent witnesses. In some classes of cases, however, a party to the record is an incompetent witness, based, however, upon considerations other than the mere fact that he is a party to the record. These classes of cases are discussed in succeeding sections of this chapter.

§ 32. **Incompetency based upon the ground of pecuniary or proprietary interest.**—At common law a person who had a pecuniary or proprietary interest in the action or suit was an incompetent

71. *Appleton v. Boyd*, 7 Mass. 131; *Rex v. Woburn*, 10 East 403.

72. *Frazier v. Laughlin*, 6 Ill. 347; *Scott v. Lloyd*, 12 Peters (U. S.) 149.

73. *Welchell v. State*, 23 Ind. 89.

74. *Henderson v. State*, 70 Ala. 23; *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *State v. Minor*, 117 Mo. 303, 22 S. W. R. 1085.

75. *Love v. People*, 160 Ill. 501, 43 N. E. R. 710; *State v. Steifel*, 106 Mo. 129, 17 S. W. R. 227.

witness.⁷⁶ The fact that he was not a party to the action or suit was immaterial in such case.⁷⁷ The rule was applicable in both civil and criminal cases. As a general rule, a person who had a pecuniary interest in the outcome of a criminal prosecution was an incompetent witness.⁷⁸ But the courts held that the complaining witness or prosecutor was a competent witness, even although by statute he was entitled to a reward.⁷⁹ This exception was based upon public policy. Moreover, he was held competent to testify although he had furnished the prosecution pecuniary aid;⁸⁰ or was liable for costs where the court found that the prosecution was malicious.⁸¹ The party injured by the criminal act was a competent witness against the defendant.⁸² The defendant, however, was an incompetent witness in his own behalf.⁸³

76. *Peirce v. Chase*, 8 Mass. 487; *Mason v. Jones*, 36 Ill. 212; *Keiser v. Moore*, 14 Mo. 28; *Marston v. Carr*, 16 Ala. 325.

77. *Hooker v. Johnson*, 8 Fla. 453; *McEwen v. Johnson*, 7 Cal. 258; *Blake v. Irish*, 21 Me. 450; *Cook v. Mix*, 11 Conn. 432.

78. *State v. Fellows*, 3 N. C. 340; *State v. Bixby*, 39 Ia. 465.

79. *Com. v. Moulton*, 9 Mass. 30; *United States v. Murphy*, 16 Peters, 203.

80. *People v. Cunningham*, 1 Denio (N. Y.) 524, 43 Am. Dec. 709.

81. *Gilliam's Case*, 4 Leigh (Va.) 688; *State v. Blennerhasset*, 1 Miss. 7.

82. *State v. Pike*, 33 Me. 361; *Com. v. Moulton*, *supra*; *Kersh v. State*, 24 Ga. 191; *Sandy v. State*, 60 Ala. 58.

83. *State v. Bixby*, 39 Ia. 465; *Batre v. State*, 18 Ala. 119; *Harwell v. State*, 10 Lea (Tenn.) 544.

The fact that persons had staked a wager on the outcome of a trial did not render them incompetent witnesses.⁸⁴ Nor did a hope of gain growing out of any illegal agreement have that effect.⁸⁵ But, as a rule, a person who would gain by the successful outcome of a trial, or lose by the unsuccessful outcome of it was an incompetent witness.⁸⁶ A mere prejudice or bias in regard to the case did not render a person incompetent.⁸⁷ The interest to disqualify had to be of a pecuniary nature, and it had to be legal, certain and direct.⁸⁸ A mere moral obligation pertaining to the case was insufficient to disqualify.⁸⁹ But the fact that a person was pecuniarily interested in the costs of the trial rendered him incompetent.⁹⁰ Mr. Greenleaf says "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must

84. *Kellog v. Nelson*, 5 Wis. 125; *United States v. Carrico*, 25 Fed. Cas. No. 14, 734, 5 Cranch C. C. 112.

85. *Charleston v. Weikman*, 1 Rich. (S. C.) 240.

86. *Blum v. Stafford*, 49 N. C. 94; *Woodruff v. Daggett*, 20 N. J. L. 526.

87. *People v. Cunningham*, *supra*; *Cockrum v. State*, 24 Tex. 394; *Summerall v. Thomas*, 3 Fla. 298.

88. *Carbon v. Stout*, 2 Bush (Ky.) 246; *Cutter v. Fanning*, 2 Ia. 580; *Scule v. Mason*, 43 Pa. St. 99; *Gott v. Williams*, 29 Mo. 461.

89. *Fink v. McClung*, 9 Ill. 569; *Jones v. Love*, 9 Cal. 68.

90. *Myers v. Walker*, 31 Ill. 353; *Ware v. Jordan*, 21 Ala. 837; *Bennett v. Dowling*, 22 Tex. 660.

be a present, certain and vested interest, and not an interest, uncertain, remote, or contingent.”⁹¹ Where the interest was contingent or doubtful, while it might have affected the person’s credibility, it did not render him incompetent.⁹² A mere expectation of gaining some material advantage from the outcome of the suit did not disqualify a person.⁹³ Where the interest was adverse to the party calling him, or where their interests were balanced, the party was a competent witness.⁹⁴ Assignors were usually regarded as disqualified.⁹⁵ But a partner who had assigned all his interest, and who had been released from all liability, was a competent witness in a suit relating to a firm transaction.⁹⁵ A party to a non-negotiable note was a competent witness to impeach its validity.⁹⁶ A bankrupt,⁹⁷ and also his creditors,⁹⁸ were disqualified in bankruptcy proceedings, where their testimony had the effect of increasing or diminishing the estate. A *cestue que trust* was not qualified to testify on behalf of the trustee where the proceedings involved the trust estate.⁹⁹ Where a vendor was

91. 1 Greenleaf on Evid. § 390. See also, *Adams v. Bd. of Trustees*, 37 Fla. 266, 20 So. R. 266.

92. *Scull v. Mason*, *supra*; *Cutter v. Fanning*, *supra*.

93. *Coghill v. Boring*, 15 Cal. 213.

94. *Smalley v. Ellet*, 136 Ill. 500.

95. *Hosack v. Rogers*, 25 Wend. (N. Y.) 313.

96. *Brown v. Babcock*, 3 Mass. 29.

97. *Williams v. Williams*, 6 M. & W. 170.

98. *Farrington v. Farrington*, 4 Mass. 237.

99. *Buchanan v. Buchanan* 46 Pa. St. 186

sued for breach of covenant of warranty he was an incompetent witness.¹⁰⁰ And the drawer of a bill of exchange was not qualified to testify in an action on the bill against the acceptor.¹

A mere personal or business relationship with a party to the suit did not render a person an incompetent witness.² But growing out of such relationship his interest might have rendered him incompetent.³

A person who was disqualified owing to his interest could remove the disqualification by transferring or releasing his interest.⁴ Moreover, the parties to the action could waive the disqualification by consenting to the party testifying.⁵

§ 33. Statutory abrogation of the common-law rule.—Statutory provisions, both in England and in this country, have abrogated the common-law rule which disqualified a person on the ground of interest. Some of the early statutes *modified* rather than *abrogated* the rule. But the modern statutes very generally abrogate the rule. For a list of many of these statutes see 40 Cyc. 2256.

100. *Meek v. Waltham*, 20 Ark. 648.

1. *Barney v. Newcomb*, 9 Cush. (Mass.) 46.

2. *Kennedy v. Evans*, 31 Ill. 258; *Jones v. Sasser*, 18 N. C. 452.

3. *George v. Kimball*, 24 Pick. (Mass.) 234; *Browning v. Cooper*, 18 N. J. L. 196.

4. *Fash v. Blake*, 38 Ill.

5. *Fletcher v. Sanders*, 7 Dana, (Ky.) 345, 32 Am. Dec. 96; *Allen v. Brown*, 5 Mo. 323.

These statutes have been frequently interpreted by the courts as *enabling* and not *disabling* acts.⁶ They are given a liberal interpretation. Statutes which remove the disqualification in civil actions are held to apply to all judicial proceedings which involve property rights, irrespective of the nature of the court in which the rights are adjudicated.⁷ And since bastardy proceedings are civil rather than criminal proceedings these statutes apply to them.⁸ But they do not apply to proceedings which are essentially criminal in their nature.⁹ The statutes generally provide, however, that defendants in criminal cases may testify in their own behalf if they choose to do so.¹⁰ But they may not, however, be compelled to do so.¹¹ In a few states the statutes contain restrictions under certain circumstances; as for

6. *Curry v. Curry*, 114 Pa. St. 367, 7 Atl. R. 61; *Bradshaw v. Combs*, 102 Ill. 428; *Bates v. Forcht*, 89 Mo. 121.
7. *Cherry v. Com.*, 78 Va. 375 (to revoke a license); *In re Raab*, 16 Ohio St. 273 (administrator's account); *Barker v. Bell*, 46 Ala. 216 (contest of will); *In re Reynolds*, 20 Fed. Cas. No. 11, 721 (habeas corpus); *Reddick v. State*, 21 Tex. App. 267, 17 S. W. R. 465 (on bail bond).
8. *People v. Starr*, 50 Ill. 52; *State v. Evans*, 19 Ind. 92; *State v. McIntosh*, 64 N. C. 607.
9. *Harwell v. State*, 10 Lea. (Tenn.) 544 (contempt proceedings); *State v. Darrington*, 47 Ia. 518 (to keep the peace).
10. *State v. Kinder*, 96 Mo. 548, 10 S. W. R. 77; *Com. v. Mullen*, 150 Mass. 394, 23 N. E. R. 51; *State v. Sims*, 106 La. 453, 31 So. 71.
11. *Counselman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591.

example where the ground of the suit or action is adultery,¹² breach of promise of marriage,¹³ etc. Again, some statutes provide that where one of the parties to the record is incompetent to testify the other party shall not be permitted to do so.¹⁴ These statutes do not apply, however, to an action by or against a corporation. For while the legal entity itself is physically incapable of testifying it can do so through its officers and agents.¹⁵

§ 34. **Same. Other exceptions.**—The enabling statutes which have abrogated the common-law rule which disqualified persons to testify on the ground of interest are very generally subject to the exception that interested persons are disqualified in actions against the executors or administrators of *deceased* persons, or against the guardians of *incompetent* persons, growing out of transactions with them.¹⁶ The courts hold,

12. *Graves v. Harris*, 117 Ga. 817, 45 S. E. R. 239.

13. *Graves v. Rivers*, 123 Ga. 224, 51 S. E. R. 318.

14. *Ginter v. Breeden*, 90 Va. 565, 19 S. E. R. 656; *Handlong v. Barnes*, 30 N. J. L. 69.

15. *North Hudson County Ry. Co. v. May*, 48 N. J. L. 401, 5 Atl. R. 276.

16. *In re Van Houghton*, 147 Ia. 725, 124 N. W. R. 886, 140 Am. St. Rep. 340; *Rudolph v. Rudolph*, 207 Pa. St. 339, 56 Atl. R. 933; *Park v. Ensign*, 10 Kan. App. 173, 63 Pac. R. 280; *Telford v. Howell*, 220 Ill. 52, 77 N. E. R. 82; *Sheldon v. Carr*, 139 Mich. 654, 103 N. W. R. 181; *Lowe v. Lowe*, 111 Md. 113, 73 Atl. R. 878; *Dolan v. Leary*, 174 N. Y. 540, 66 N. E. R. 1107; *Brader v. Brader*, 110 Wis. 423, 85 N. W. R. 681; *Harrell v. Hagan*, 150 N. C. 242, 63 S. E. R. 952.

however, that to exclude the testimony under this exception the case must come clearly within the terms of the statute.¹⁷ As said in a Georgia decision, it is not enough that the case comes within the spirit of the statute, it must come within the letter of it.¹⁸ Thus, it does not apply to a transaction with a corporation which has since become defunct.¹⁹ In order to exclude testimony under the statutory provisions under discussion three elements must concur: "(1) The witness must belong to a class which the statute renders incompetent; (2) the party against whom the testimony is offered must belong to a class protected by the statute; and (3) the testimony itself must be of a nature forbidden by the statute."²⁰ If any of these three elements is lacking the testimony is admissible.²¹

The statutes of exclusion in the various states are not at all harmonious. Under most of them, however, the rule of exclusion is applicable only where one party to the action sues or defends as the representative of a decedent or incompetent

17. *Collins v. Crawford*, 214 Mo. 167, 112 S. W. R. 538, 127 Am. St. Rep. 661; *Crone v. Crone*, 170 Ill. 494, 49 N. E. R. 217; *Shrader v. United States Glass Co.*, 179 Pa. St. 623, 36 Atl. R. 330; *Maynard v. Greer*, 129 Ga. 709, 59 S. E. R. 798.

18. *Oliver v. Powell*, 114 Ga. 592, 40 S. E. R. 826.

19. *Williams v. Edwards*, 94 Mo. 447, 7 S. W. R. 429.

20. 40 Cyc. 2263.

21. *Morris v. Clinkscales*, 47 S. C. 488, 25 S. E. R. 797.

person.²² It is immaterial whether the representative is plaintiff or defendant.²³

Where the statute excludes testimony in actions by or against guardians of incompetent persons the courts hold that it does not apply to actions between guardians and their wards; but is confined to actions between guardians and third persons.²⁴ Moreover, it has been held that such a statute does not apply where an infant defendant answers by a guardian *ad litem*.²⁵ It also has been held that, where one of the parties to the action is the representative of a deceased person, the rule of exclusion is applicable only where the case involves a direct and immediate conflict of interest between the dead and the living.²⁶

Under some statutes the rule of exclusion is not applicable unless the testimony tends to increase or diminish the decedent's estate.²⁷ Thus, where the contest pertains to the distribution of the insurance on the life of the decedent;²⁸ or

22. *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. R. 316.

23. *Leason v. Nicolson*, 59 Ia. 259, 12 N. W. R. 270, 13 N. W. R. 289.

24. *Jones v. Parker*, 67 Tex. 76, 3 S. W. R. 222.

25. *McDonald v. McDonald*, 24 Ind. 68.

26. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566.

27. *Seymour v. Wallace*, 127 Mich. 669, 87 N. W. R. 90; *Doe v. Edmondson*, 145 Ala. 557, 40 So. R. 505; *City Nat. Bank v. Crahan*, 135 Ia. 230, 112 N. W. R. 793; *Morgan v. Brooker*, 106 Va. 369, 56 S. E. R. 137.

28. *Knights of the Maccabees v. Savage*, 135 Mich. 459, 98 N. W. R. 26; *Farenkoph v. Holm*, 237 Ill. 94, 86 N. E. R. 702.

to a claim of dower by the widow of the decedent against his alleged grantee;²⁹ or to the distribution of the decedent's estate,³⁰ or to a family allowance out of the estate,³¹ the rule of exclusion has been held not to apply. Nor does it apply to provisions for probating a will.³² The proponent and executor in such case is a competent witness.³³ Nor does the rule of exclusion apply in an action to recover damages for causing the death of the decedent.³⁴ As a general rule, the representative of the decedent is a competent witness;³⁵ while, on the other hand, a party adverse to him is incompetent.³⁶

§ 35. Subscribing witnesses to a will.—A sub-

29. *Lake v. Nolan*, 81 Mich. 112, 45 N. W. R. 376.

30. *Nolen v. Doss*, 133 Ala. 259, 31 So. R. 969; *In re Allen*, 207 Pa. St. 325, 56 Atl. R. 928. *Contra*, *Crumley v. Worden*, 201 Ill. 105, 66 N. E. R. 318.

31. *In re McCausland*, 52 Cal. 568.

32. *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. R. 522; *Williams v. Miles*, 68 Neb. 463, 94 N. W. R. 705, 96 N. W. R. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383, 4 Ann. Cas. 306.

33. *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. R. 874.

34. *Lake Erie, etc., Ry. Co. v. Charman*, 161 Ind. 95, 67 N. E. R. 923.

35. *Grindle v. Grindle*, 240 Ill. 143, 88 N. E. R. 473; *Cincinnati, etc., Ry. Co. v. Cregor*, 150 Ind. 625, 50 N. E. R. 760; *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. R. 4.

36. *Bailey v. Robison*, 244 Ill. 16, 91 N. E. R. 98; *Frye v. Gullion*, 143 Ia. 719, 121 N. W. R. 563; *Roach v. Roach*, 69 Kan. 522, 77 Pac. R. 108; *Forrester v. Sullivan*, 231 Mo. 345, 132 S. W. R. 722; *Boyd v. Daily*, 176 N. Y. 613, 68 N. E. R. 1114; *Shroyer v. Smith*, 204 Pa. St. 310, 54 Atl. R. 24.

scribing witness to a will, or the husband or wife of a subscribing witness to a will, who is also a beneficiary, is an incompetent witness to prove the will. Mr. Best says that this exception is the "sole survival of the numerous exclusionary rules making witnesses incompetent by reason of relationship or pecuniary interest."³⁷ Where an heir-at-law is a subscribing witness to a will, and not a beneficiary, he is a competent witness to prove the will.³⁸

§ 36. **Widow, heirs and beneficiaries.**—The widow of a decedent is a competent witness in a suit involving the decedent's estate, where she is not a party.³⁹ But where she is interested in the result of the suit she is incompetent.⁴⁰

An heir, as such, is not necessarily disqualified as a witness where the decedent's estate is involved.⁴¹ But where the result of the action may be to increase or diminish the estate of the decedent, and the heir has a direct interest in the result, he is incompetent to testify.⁴² The mere

37. Best on Evid. (Chamberlain's ed.) 178, note.

38. Sparhawk v. Sparhawk, *et al.*, 10 Allen (Mass.) 155; Strawn v. Shank, 110 Pa. 259, 262.

39. Dicken v. Winters, 169 Pa. St. 126, 32 Atl. R. 289; Lynn v. Hocaday, 162 Mo. 111, 61 S. W. R. 885, 85 Am. St. Rep. 480; Litchfield v. Merritt, 102 Mass. 520.

40. Sanford v. Ellithorp, 95 N. Y. 48.

41. Muir v. Miller, 82 Ia. 700, 47 N. W. R. 1011, 48 N. W. R. 1032 (suit to set aside a distribution by father, and one son not a party).

42. Penny v. Croul, 87 Mich. 15, 49 N. W. R. 311, 13 L. R. A. 83; Woodbury v. Henning, 148 Ia. 23, 126 N. W. R. 912; Keener v. Zartman, 144 Pa. St. 179, 22 Atl. R. 889.

fact that a person may eventually share in a decedent's estate, which is the subject-matter of the suit, does not disqualify him.⁴³ Nor does the fact that a person is the husband of an heir who is disqualified.⁴⁴ Moreover, where the estate is insolvent an heir is not disqualified.⁴⁵

Legatees and devisees under a will are held to be competent witnesses in a contest over a will.⁴⁶ This is based upon the fact that their interests are contingent, in that they are dependent upon the amount of the decedent's debts. The latter must be paid first. Another reason that has been assigned for the rule is that legatees and devisees are not parties to the suit.⁴⁷

§ 37. Sureties and guarantors.—The sureties on a guardian's bond, in a suit by his ward to recover money wrongfully appropriated by the guardian, are incompetent witnesses.⁴⁸ And the sureties on the bond of an executor or administrator are also incompetent witnesses.⁴⁹ Moreover, the sureties on a prosecution bond are not competent to testify against the defendants in an action founded upon a personal transaction

43. *Boyd v. Boyd*, 163 Ill. 611, 45 N. E. R. 118; *Harraway v. Harraway*, 136 Ala. 499, 34 So. R. 836.

44. *Freeman v. Freeman*, 62 Ill. 189.

45. *Gidney v. Logan*, 79 N. C. 214.

46. *Disbrow's Est.*, 58 Mich. 96, 100, 24 N. W. R. 624.

47. *Wheeler v. Towns*, 43 N. H. 56.

48. *Crawford v. Parker*, 96 Ga. 156, 23 S. E. R. 196.

49. *Miller v. Montgomery*, 78 N. Y. 282.

with a decedent under whom the defendants claim.⁵⁰

§ 38. **Transactions with agents and partners.**—In an action between a party and the representative of a deceased person one who had acted as an agent of either party, concerning the matters in dispute, is, as a general rule, a competent witness.⁵¹ In a few states, however, the statutes provide otherwise.⁵² In most jurisdictions either party to the action is competent to testify to transactions between one of the parties and a deceased agent of the other party.⁵³ In a few jurisdictions, however, the statutes exclude the adverse party as to transactions between him and the deceased agent of the other party.⁵⁴ As a general rule, the agent of the adverse party is competent to testify to transactions between him and a deceased or incompetent party.⁵⁵ This view is based upon the fact that the agent is neither a party to the action nor interested in the result. The statutes upon this

50. *McGowan v. Davenport*, 134 N. C. 526, 47 N. E. R. 27.

51. *Whitman v. Foley*, 125 N. Y. 651, 26 N. E. R. 725; *Shaub v. Smith*, 50 Ohio St. 648; *O'Neill v. Wilcox*, 115 Ia. 15, 87 N. W. R. 742.

52. *Ins. Co. of N. Amer. v. Brim*, 111 Ind. 281, 12 N. E. R. 315; *McCamy v. Cavender*, 92 Ga. 254.

53. *Roberts v. Richmond Co.*, 109 N. C. 670; *Reynolds v. Iowa Ins. Co.*, 80 Ia. 563.

54. *Gustafson v. Eger*, 132 Mich. 387, 93 N. W. R. 893; *Moore v. May*, 117 Wis. 192, 94 N. W. R. 45.

55. *Darwin v. Keiger*, 45 Minn. 64; *Nerpass v. Gilman*, 104 N. Y. 506.

point, however, are not harmonious. Where the agent is personally interested in the outcome of the suit, as in case of fraudulent transactions on his part in the execution of the agency, he is not a competent witness to testify to transactions between him and a deceased or incompetent person.⁵⁶ In an action between an agent and a party to the contract the fact that the subject-matter of the action belonged to deceased does not make the agent an incompetent witness.⁵⁷

In an action between a surviving partner and another, growing out of a firm transaction made between the latter and a partner since deceased in the absence of the surviving partner, the party with whom the contract was made is an incompetent witness.⁵⁸ He is a competent witness, however, if the transaction was entered into in the presence of the surviving witness.⁵⁹ Where the representative of a deceased partner is a party to an action the surviving partners are incompetent witnesses both in their own behalf and against the representative.⁶⁰ In an action against the owner of a business, where the proof does not show that he is incapable of meeting his obligations growing out of the business, one

56. *Butz v. Schwartz*, 135 Ill. 180.

57. *Davis v. Hawkins*, 163 Pa. St. 228.

58. *People's Nat. Bank v. Wilcox*, 136 Mich. 567, 100 N. W. R. 24; *Harris v. Bank*, 22 Fla. 501, 1 Am. St. Rep. 201.

59. *McGehee v. Jones*, 41 Ga. 123; *Lawrence v. Vilas*, 20 Wis. 381.

60. *Dick v. Williams*, 130 Pa. St. 41; *Godfrey v. Templeton*, 86 Tenn. 161.

who has made himself liable as a partner by holding himself out as a partner is a competent witness.⁶¹

§ 39. **Members of a corporation.**—Some statutes provide that persons interested in the outcome of a suit are incompetent witnesses; while others provide that parties to the suit are incompetent. In the former case both the officers⁶² and the stockholders⁶³ of a corporation are disqualified; while in the latter case both the officers⁶⁴ and the stockholders⁶⁵ of a corporation are competent witnesses. Since the competency of a witness depends upon his status when he is called,⁶⁶ a former stockholder who has disposed of his stock is competent to testify.⁶⁷ Some courts, however, have held the con-

61. *Hucaba v. Abbott*, 87 Ala. 409, 6 So. R. 48.

62. *Chicago University v. Emmett*, 108 Ia. 500, 79 N. W. R. 285; *Farmers' Bank v. Wickliffe*, 134 Ky. 627, 121 S. W. R. 498.

63. *Farmers' Bank v. Wickliffe*, *supra*; *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481, 25 N. E. R. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

64. *Mendenhall v. Jewell County School Dist.*, 76 Kan. 173, 90 Pac. R. 773; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. R. 908, 71 Am. St. Rep. 418, 42 L. R. A. 745.

65. *Johnson v. Fraternal Reserve Assoc.*, 136 Wis. 528, 117 N. W. R. 1019; *Flach v. Gottschalk*, *supra*.

66. *In re McNaughton*, 138 Wis. 179, 118 N. W. R. 997, 120 N. W. R. 288; *Bank of Southwestern Georgia v. McHarrah*, 120 Ga. 944, 48 S. E. R. 393.

67. *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709, 85 N. W. R. 949; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. R. 874.

trary.⁶⁸ In an action against a corporation to compel it to transfer stock, where the person from whom the plaintiff purchased it is dead, the plaintiff is a competent witness.⁶⁹ In an action between a corporation and an individual, growing out of a transaction between the latter and an agent of the corporation who is since deceased, the individual who dealt with the agent is an incompetent witness.⁷⁰ The reason is the corporation is not the survivor of the agent. Moreover, since the corporation is merely an artificial being it has no knowledge of the transaction. In regard to a transaction by an agent of the corporation the adverse party is a competent witness although the corporation has been dissolved, provided the agent is still living.⁷¹ And in an action against a corporation to compel it to make a transfer of stock purchased by the plaintiff, the latter is a competent witness in his own behalf, even when his vendor is since deceased.⁷²

§ 40. Incompetency of person from whom title or interest is derived.—Some statutes provide that the party from whom another derives title

68. *Lenora Nat. Bank v. Ragland*, 128 Ky. 548, 108 S. W. R. 854, 32 Ky. L. Rep. 1403.

69. *Firemen's Ins. Co. v. Peck*, 126 Ill. 493.

70. *Sidway v. Missouri Co.*, 163 Mo. 342, 63 S. W. R. 705; *Florida Central Co. v. Usiana*, 111 Ga. 697, 36 S. E. R. 928.

71. *Williams v. Edwards*, 94 Mo. 447.

72. *Firemen's Ins. Co. v. Peck*, 126 Ill. 493.

or interest in property is not competent to testify in an action concerning the property.⁷³ Thus, assignors,⁷⁴ grantors⁷⁵ and mortgagors⁷⁶ have been held incompetent under these statutes. On the other hand, the parties to negotiable paper are competent witnesses under them.⁷⁷ And in an action between a spouse and a third party the other spouse may be a competent witness. Thus, where the wife performs services which are to accrue to her separate estate the husband is a competent witness in an action by the wife to recover the value of the services.⁷⁸ And where the husband is entitled to his wife's services and he sues to recover their value the wife is a competent witness.⁷⁹ Whether a parent is a competent witness or not, in an action by his or her child against a third person to recover the value of services, depends upon the circumstances of the particular case.⁸⁰

73. *Gray v. Wright*, 142 Ia. 225, 119 N. W. R. 612; *Toner v. Wagner*, 158 Ind. 447, 63 N. W. R. 612; *Dreger v. Budde*, 133 Wis. 516, 113 N. W. R. 950.

74. *Shields v. Smith*, 104 N. C. 57, 10 S. E. R. 76; *Tintsman v. Croushore*, 104 Pa. St. 192.

75. *Ferbrache v. Ferbrache*, 110 Ill. 210; *Moore v. Williams*, 129 Ala. 329, 29 So. R. 795.

76. *Clinton Sav. Bank v. Underhill*, 115 Ia. 292, 88 N. W. R. 357.

77. *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142.

78. *Slack v. Norton*, 111 Mich. 213, 69 N. W. R. 497.

79. *Porter v. Dunn*, 131 N. Y. 314, 30 N. E. R. 122.

80. *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. R. 916 (mother incompetent); *Weese v. Yokum*, 62 W. Va. 550, 59 S. E. R. 514.

§ 41. **Incompetency of surviving party to a contract.**—Under some statutes where one of the parties to a contract is deceased or incompetent the other party is disqualified.⁸¹ These statutes, however, are not harmonious. Thus, under some the disqualification is confined to the original parties to the contract;⁸² while under others it extends to parties who derive their rights under the contract from the original parties.⁸³ These statutes have been held not to apply to actions involving title to real estate.⁸⁴ A discharge in bankruptcy is not considered the equivalent of death or incompetency.⁸⁵

§ 42. **Some statutes very broad.**—In a few states the disqualifying statutes are very broad. Thus, in California interested persons are incompetent to testify to any fact which occurred prior to the decedent's death.⁸⁶ It is generally held, however, that a person is not disqualified to testify unless his *interest* is adverse to that of the decedent.⁸⁷ The mere fact that his *testimony*

81. Bloomsburg First Nat. Bank v. Gerli, 225 Pa. St. 256, 74 Atl. R. 52; Green Real Est. Co. v. St. Louis Mut. House Bldg. Co., 196 Mo. 358, 93 S. W. R. 1111.

82. O'Bryan v. Allen, 95 Mo. 68, 8 S. W. R. 225; Kenyon v. Peirce, 17 R. I. 794, 24 Atl. R. 825.

83. Eyermann v. Piron, 151 Mo. 107, 52 S. W. R. 229. See also, Asbury v. Hicklin, 181 Mo. 658, 81 S. W. R. 390.

84. Warren v. Steer, 112 Pa. St. 634, 5 Atl. R. 4.

85. Oatis v. Harrison, 60 Ga. 535.

86. Stuart v. Lord, 138 Cal. 672, 72 Pac. R. 142.

87. Bloomsburg First Nat. Bank v. Gerli, *supra*; Perry v. Hodnett, 38 Ga. 103.

is adverse to the decedent does not disqualify him.⁸⁸ Where both the contracting parties are dead, and the action is between their administrators, the statutes do not apply.⁸⁹

§ 43. Persons to whom the statutes apply.—

The statutes which disqualify the surviving party to a contract, whose interest is adverse to that of the decedent, apply to many classes of persons, including the parties to a deed,⁹⁰ mortgage,⁹¹ bond,⁹² lease,⁹³ or contract of sale.⁹⁴ A donor who seeks to set aside a gift after the donee's death is an incompetent witness.⁹⁵ And an alleged donee who seeks to establish a gift after the donor's death is an incompetent witness.⁹⁶ But where the alleged gift is one merely in name and not in substance the apparent donee is not incompetent to testify to the facts. Thus, where a wife's land is sold and a promissory note is given by the purchaser in payment of the purchase price, payable to the husband and wife,

88. *Bloomsburg First Nat. Bank v. Gerli*, *supra*.

89. *Atkin v. Atkin*, 69 Vt. 270, 37 Atl. R. 746.

90. *Brown v. Patterson*, 224 Mo. 639, 124 S. W. R. 1; *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494.

91. *Junkins v. Lovelace*, 72 Ala. 303.

92. *Grigsby v. Simpson*, 28 Gratt. (Va.) 348.

93. *Duffield v. Hue*, 129 Pa. St. 94, 18 Atl. R. 566.

94. *Saunders v. Greever*, 85 Va. 252, 7 S. E. R. 391.

95. *Yeakel v. McAtee*, 156 Pa. St. 600, 27 Atl. R. 277; *Wade v. Pulsifer*, 54 Vt. 45.

96. *Patterson v. Dushane*, 115 Pa. St. 334, 8 Atl. R. 440; *Bothwell v. Dobbs*, 59 Ga. 787.

and the husband subsequently gives this note to the wife, the latter is a competent witness, after the husband's death, to prove the facts.⁹⁷ On the other hand, either spouse is incompetent to testify to a contract made between them where the other spouse is dead.⁹⁸ Whether this rule is applicable or not to exclude an alleged widow from testifying to the fact of marriage is a question upon which the decisions are not harmonious.⁹⁹

In a contest over a will, the heir and beneficiaries are competent witnesses.¹⁰⁰ They are not, of course, surviving parties to a contract. Moreover, the rule applicable to donees in the case of gifts *inter vivos* does not apply.

Whether a surviving partner is a competent witness or not depends upon the circumstances of the particular case. In a suit for an accounting he is incompetent to testify in his own behalf as regards transactions with a deceased copartner.¹ But in an action against him on a note given by the deceased partner in the firm name

97. *Magee v. Burch*, 108 Mo. 336, 18 S. W. R. 1078.

98. *In re Robinson*, 222 Pa. St. 113, 70 Atl. R. 966, 128 Am. St. Rep. 794; *Smith v. Lurtz*, 108 Va. 799, 62 S. E. R. 789; *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. R. 202, 96 Am. St. Rep. 486, 61 L. R. A. 166.

99. *Green v. Green*, 126 Mo. 17, 28 S. W. R. 752, 1008 (widow not disqualified); *Redgrave v. Redgrave*, 38 Md. 93 (widow disqualified).

100. *McKee v. Downing*, 224 Mo. 115, 124 S. W. R. 7 (heir); *Garvin v. Williams*, 50 Mo. 206 (beneficiary).

1. *Graham v. Howell*, 50 Ga. 203.

he is a competent witness to prove that the note was fraudulently given by the partner since deceased wholly for his own private benefit.²

In the case of a contract between a principal and agent the death of either renders the other party an incompetent witness.³ But where the agent makes a contract with a third party on behalf of his principal, the death of either the third party or the principal does not render the agent an incompetent witness.⁴ This is owing to the fact that the agent is merely a go-between and not a party to the contract. But where the principal is dead, and the agent disqualified although living, the third party is incompetent.⁵

Where one of two obligees or obligors of a contract is dead the adverse party is, ordinarily, a competent witness.⁶ Under a few statutes, however, the rule is otherwise.⁷

The statutes under discussion usually protect the representatives of deceased persons, including executors and administrators.⁸ They also

2. *Lancaster Co. Nat. Bank v. Henning*, 171 Pa. St. 399, 33 Atl. 335.
3. *Brown v. Brightman*, 11 Allen (Mass.) 226; *Harper v. Dillon*, 60 Ga. 498.
4. *Sargeant v. Nat. L. Ins. Co.*, 189 Pa. St. 341, 41 Atl. R. 351; *Clark v. Thias*, 173 Mo. 628, 73 S. W. R. 616.
5. *Lyngar v. Shafer*, 125 Mo. App. 398, 102 S. W. R. 630.
6. *Bennett v. Frary*, 55 Tex. 145; *Ash v. Guie*, 97 Pa. St. 493, 39 Am. Rep. 818.
7. *Hefflebower v. Detrick*, 27 W. Va. 16; *Gavin v. Bischoff*, 80 Ia. 605, 45 N. W. R. 306.

usually protect the heirs and beneficiaries of a decedent.⁹ Some protect the grantee of a decedent,¹⁰ while others do not.¹¹ And some protect the assignee of a decedent,¹² while others do not.¹³ They do not protect the creditors of a decedent.¹⁴ But they have been held to protect the sureties of a decedent.¹⁵ Whether they protect the widow of a decedent depends upon the circumstances of the particular case. Where she sues or defends in the capacity of executrix or administratrix of her deceased husband they protect her.¹⁶ But where she sues in her own behalf, claiming in her own right, they do not protect her.¹⁷ They protect an administrator or

8. *Burke v. Dunn*, 117 Mich. 430, 75 N. W. R. 931; *Kersey v. O'Day*, 173 Mo. 560, 73 S. W. R. 481; *Moore v. Finigar*, 131 N. Y. App. Div. 399, 115 N. Y. Suppl. 1035.
9. *Gladville v. McDole*, 247 Ill. 34, 93 N. E. R. 86; *Renz v. Drury*, 57 Kan. 84, 45 Pac. R. 71; *Joss v. Mohn*, 55 N. J. L. 407, 26 Atl. R. 987.
10. *Hendrick v. Daniel*, 119 Ga. 358, 46 S. E. R. 438.
11. *Hudson v. Hudson*, 237 Ill. 9, 86 N. E. R. 661.
12. *Kolasky v. Michels*, 120 N. Y. 635, 24 N. E. R. 278.
13. *Elliott v. Shaw*, 32 Ohio St. 431; *Leach v. Nichols*, 55 Ill. 273.
14. *Hutzler v. Phillips*, 26 S. C. 136, 1 S. E. R. 502, 4 Am. St. Rep. 687; *Uhlmann v. Brownell*, 121 N. Y. 652, 24 N. E. R. 1091.
15. *McGowan v. Davenport*, 134 N. C. 526, 47 S. E. R. 27.
16. *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. R. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.
17. *Lake v. Nolan*, 81 Mich. 112, 45 N. W. R. 376 (contract between widow claiming dower and grantee of deceased husband); *Flowers v. Flowers*, 92 Ga. 68, 18 S. E. R. 1006 (dower proceedings).

executor *de son tort*,¹⁸ but not a foreign administrator or executor.¹⁹

For an able and exhaustive discussion of the statutes relating to the competency of witnesses in actions involving the estates and transactions of deceased or incompetent persons see 40 Cyc. pp. 2256-2352.

§ 44. **Accomplices.**—An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites with him in the commission of a crime.²⁰ As to the competency of an accomplice the decisions have not been harmonious. According to some of the early decisions an accomplice could not testify without the assent of the court. Moreover, he must have been acquitted of the crime at issue.²¹ According to other early decisions an accomplice was a competent witness, even when the law excluded persons who were interested in the outcome of the action.²² This was based upon necessity. If the rule had been otherwise justice might have been defeated. But even under this more liberal rule accomplices were incompetent witnesses where they were parties to

18. *Parker v. Thompson*, 30 N. J. L. 311.

19. *Buckingham v. Andrews*, 34 Barb. (N. Y.) 434, 12 Abb. Pr. 322.

20. *People v. Bolanger*, 71 Cal. 20, Whart. Crim. Evid., § 440; 4 Bl. Comm. 35.

21. *Meyers v. State*, 3 Tex. Cr. App. 8; *Fitzgerald v. State*, 14 Mo. 413.

22. *Gray v. People*, 26 Ill. 344; *Ayers v. State*, 88 Ind. 275; *Noland v. State*, 19 Ohio 131.

the record.²³ Or had previously been convicted of an infamous crime, unless pardoned.²⁴ Where they were jointly indicted and tried they were incompetent, unless acquitted on a separate verdict; or, if convicted on a separate verdict had paid the fine;²⁵ or had pleaded guilty.²⁶ It also has been held that where there is no evidence at all against a defendant,²⁷ or where he has been made a co-defendant merely to disqualify him as a witness,²⁸ he may testify. Where an accomplice is given a separate trial he is a competent witness for the state, although jointly indicted.²⁹ And where he is separately indicted some courts have held that he is a competent witness in be-

23. *State v. Shields*, 45 Conn. 256; *Earl v. People*, 73 Ill. 239; *United States v. Lancaster*, 2 McLean (U. S.) 431. See also, cases in foot-note 22.

24. *Com. v. Knapp*, 9 Pick. (Mass.) 495. See also, notes, 73 Am. Dec. 775; 33 Am. Rep. 639.

25. *State v. Steifel*, 106 Mo. 129; *Lindsay v. People*, 63 N. Y. 143; *R. v. Fletcher*, 1 Strange 633.

26. *Wells v. Territory*, 15 Okla. 195, 81 Pac. 425; *State v. Knudson*, 11 Idaho 524, 83 Pac. R. 226.

27. *Cochran v. Ammon*, 16 Ill. 316; *State v. Shaw*, 1 Root (Conn.) 134.

28. *Cochran v. Ammon*, *supra*; *Beasley v. Beasley*, 2 Swan (Tenn.) 180.

29. *State v. Stewart*, 142 Mo. 412, 44 S. W. R. 240; *Lindsay v. People*, 63 N. Y. 143; *Conway v. State*, 118 Ind. 482, 21 N. E. R. 285.

30. *State v. Unuble*, 115 Mo. 452, 22 S. W. R. 378. See also, *Marshall v. State*, 8 Ind. 498 (jointly indicted).

half of other defendants.³⁰ Other courts, however, have held the contrary.³¹

The modern rule, as regards the competency of accomplices, is somewhat more liberal than the early rule. Mr. Wharton says, "An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a codefendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered."³² Mr. Greenleaf says, "The usual course is, to leave out of the indictment those who are to be called as witnesses, but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in guilt."³³ And Brewer, J., says, "Referring to the English authorities, it has there been held that, at common law, and independently of any statute, when two persons jointly indicted are tried together, neither is a competent witness; but that if one is tried separately, the other is a competent witness against him, because, as observed by Mr. Justice Blackburn, 'the witness was a party to the record, but had not been given in charge to the same jury.'"³⁴ In a number of the

31. *State v. Jones*, 51 Me. 125, 126; *Com. v. Marsh*, 10 Pick. (Mass.) 57.

32. Wharton on Crim. Evid. (8th ed.), §439.

33. 1 Greenleaf on Evid., § 379.

34. *Benson v. United States*, 146 U. S. 325, 324.

states there are statutes which contain express provisions in regard to the competency of accomplices.

§ 45. Same. Participation in an act to entrap.—It is sometimes important to discriminate between a crime and an act which constitutes the basis of crime. Ordinarily, where a person participates in an act which constitutes the basis of a criminal offense with the view of entrapment he is not an accomplice. Thus, where a person purchases lottery tickets with the view of entrapping the dealer and having him prosecuted criminally the purchaser is not an accomplice.³⁵ The same principle is applicable where a person purchases intoxicating liquor of another with the view of entrapment. In each case he participates in the transaction but not in the crime. Again, where a policeman frequents a gaming house with the view of entrapment he is not an accomplice.³⁶ To be an accomplice a person must be involved either directly or indirectly in the commission of the crime. Where a person enters into a confederacy with another with the view of entrapping his confederate, he has no criminal intent. It may be well to ob-

35. *People v. Farrell*, 30 Cal. 316; *Wright v. State*, 7 Tex. App. 574; *Reg. v. Mullins*, 3 Cox's Crim. Cas. 526.
36. *Com. v. Baker*, 155 Mass. 287, 29 N. E. R. 512. See also, *Com. v. Hollister*, 157 Pa. 13, 27 Atl. R. 386, 25 L. R. A. 349; *Price v. People*, 109 Ill. 109; *State v. McKean*, 36 Ia. 343, 14 Am. Rep. 530; *People v. Bolanger*, 71 Cal. 17; *State v. Brownlee*, 84 Ia. 473, 51 N. W. R. 25 (detectives).

serve, however, that where the owner of property consents to the taking of it with the view of entrapment and prosecution there is no crime.³⁷ But merely feigning drunken slumber with that end in view does not amount to consent. Thus, where a detective caroused with persons believed to be thieves, and then feigning drunkenness wandered down an alley where he purposefully fell down and feigned to be asleep, and permitted the suspected parties to rifle his pockets, he was not an accomplice.³⁸

§ 46. Credibility of accomplices.—May a defendant be convicted solely upon the uncorroborated evidence of an accomplice? Is it prejudicial error for the trial court not to instruct the jury that they should not convict the defendant solely upon the uncorroborated evidence of an accomplice? If a defendant may not be convicted solely upon the uncorroborated evidence of an accomplice is corroborative evidence of one or more accomplices sufficient? Since an accomplice is a competent witness, and his credibility is a question for the jury to determine, it would seem that a defendant might be convicted upon his uncorroborated evidence. In harmony with this view courts have refused to set aside verdicts based solely upon this class of evi-

37. *Connor v. People*, 18 Colo. 373, 33 Pac. R. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295; *Pigg v. State*, 43 Tex. 108.

38. *People v. Hanselman*, 76 Cal. 460, 18 Pac. R. 425, 9 Am. St. Rep. 238.

dence.³⁹ On the other hand, a rule of criminal practice has obtained for a long time that the court charge the jury that they should not convict solely upon the uncorroborated evidence of an accomplice.⁴⁰ In the face of this rule, however, the higher courts have held many times that it is a matter that rests in the discretion of the trial court, and that a refusal to instruct the jury upon this point is not prejudicial error.⁴¹ In many jurisdictions, however, a conviction based solely upon the uncorroborated evidence of an accomplice is not allowable.⁴² And in many of these jurisdictions the rule of criminal practice heretofore referred to has been made a rule of law by statute.

It has been held that the evidence essential to corroborate an accomplice cannot be furnished by other accomplices.⁴³ But the wife of an accomplice may corroborate the evidence of her

39. *State v. DeHart*, 109 La. 570, 33 So. 605; *Ingalls v. State*, 48 Wis. 647, 4 N. W. R. 785; *State v. Hill*, 48 W. Va. 132, 35 S. E. R. 831.

40. *State v. Williamson*, 42 Conn. 261; *Smith v. State*, 10 Wyo. 157, 67 Pac. R. 977; *State v. Rachman*, 68 N. J. L. 120, 53 Atl. R. 1046; *R. v. Stubbs*, 33 Eng. L. & Eq. 552.

41. *Houselman v. People*, 168 Ill. 172, 48 N. E. R. 304; *Com. v. Holmes*, 127 Mass. 424.

42. *Lumpkin v. State*, 68 Ala. 56; *People v. Mayhew*, 150 N. Y. 346; *Com. v. Holmes*, 127 Mass. 424; *State v. Chyo Chiack*, 92 Mo. 395; *Carroll v. Com.*, 84 Pa. St. 107; *Childer v. State*, 52 Ga. 106; *State v. Stebbins*, 29 Conn. 483; *State v. Eisenhaus*, 132 Mo. 146.

43. *State v. Williams*, 42 Conn. 261; *United States v. Hinz*, 35 Fed. R. 272.

husband.⁴⁴ The corroborative evidence may be wholly circumstantial. Thus, where the defendant is charged with larceny, the evidence of an accomplice has been held sufficiently corroborated by showing that the goods stolen were found in the defendant's possession.⁴⁵ But the mere fact that the defendant was found in a barn where the stolen goods were found has been held insufficient corroboration.⁴⁶ Where the defendant sets up an *alibi*, evidence that he was near the place where the crime was committed at the time it occurred serves to corroborate an accomplice.⁴⁷ And other conduct of the defendant, as well as admissions or declarations by him, may be introduced in evidence for the same purpose.⁴⁸ Likewise documentary evidence which shows concerted action of the defendant and the accomplice pertaining to the crime charged.⁴⁹ The corroborative testimony must show not only material facts sufficient to prove the commission of the crime charged, but also

44. *State v. Moon*, 25 Ia. 128; *People v. Everhardt*, 104 N. Y. 591.

45. *Ryan v. State*, 83 Wis. 486; *Com. v. Savory*, 10 Cush. (Mass.) 535; *Boswell v. State*, 92 Ga. 581; *Jernigan v. State*, 10 Tex. App. 546.

46. *State v. Graff*, 47 Ia. 384.

47. *Com. v. Drake*, 124 Mass. 1.

48. *Cox v. Com.*, 125 Pa. St. 94; *People v. Collins*, 64 Cal. 293; *Partee v. State*, 67 Ga. 570.

49. *State v. Smalls*, 11 S. C. 262; *State v. Kellerman*, 14 Kan. 135.

the identity of the defendant as a participator in the commission of the crime.⁵⁰

To constitute a person an accomplice his participation in the offense charged must be wilful.⁵¹ Thus, a woman upon whom an abortion has been performed is not an accomplice.⁵² One who does not aid or abet in the commission of the offense is not an accomplice.⁵³ As previously stated, this has been held to apply to detectives or decoys who participate in acts with the view of entrapment.⁵⁴ It also applies to mere informers.⁵⁵ It has been held, however, that where the original intent to commit the offense charged was induced by the informer, or by persons other than the defendant, it does not apply.⁵⁶

§ 47. **Attorneys.**—May an attorney act in the double capacity of attorney and witness? The fact that a person acts as counsel in a case does

50. *People v. Plath*, 100 N. Y. 592; *State v. Jackson*, 106 Mo. 174, 17 S. W. R. 301; *People v. Smith*, 98 Cal. 218; *Smith v. State*, 59 Ala. 104.

51. *People v. Barrie*, 49 Cal. 324; *People v. Noelke*, 94 N. Y. 137.

52. *People v. Bliven*, 112 N. Y. 79; *Com. v. Boynton*, 116 Mass. 343.

53. *People v. Ogle*, 104 N. Y. 511 (murderer placed knife in hands of party after the commission of the crime).

54. *Com. v. Cohen*, 127 Mass. 282; *Campbell v. Com.*, 84 Pa. St. 87; *People v. Noelke*, 94 N. Y. 178.

55. *State v. McKean*, 36 Ia. 343; *People v. Farrell*, 30 Cal. 356.

56. *State v. Jansen*, 22 Kan. 498; *Saunders v. People*, 38 Mich. 218; *Allen v. State*, 40 Ala. 344; *United States v. Slinker*, 32 Fed. R. 691.

not disqualify him as a witness.⁵⁷ Courts, however, frown upon the practice of acting in the double capacity of attorney and witness. Upon this point Metcalf, J., says, "The only question that has been argued in this case is, whether the plaintiff's attorney, who acted as counsel at the trial, was a competent witness for his client; and we know of no common law authority for excluding his testimony. . . . In most cases, counsel cannot testify for their clients without subjecting themselves to just reprehension. But there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it. Such cases, however, are rare; and whenever they occur, they necessarily cause great pain to counsel of the right spirit."⁵⁸

An attorney, however, is not permitted to disclose confidential communications between himself and client. This subject is treated in the next chapter.

§ 48. Judges.—May a judge act in the double capacity of court and witness? The functions of a judge and those of a witness are so inconsistent it would seem quite improper for a judge to act as a witness in a cause pending before him. And this view is very generally sustained by the

57. *Follansbee v. Walker*, 72 Pa. St. 228; *Taylor on Evid.* (4th ed.), Vol. II, § 1240.

58. *Potter v. Inhab. of Ware*, 55 Mass. 519; *Abbott v. Stribben*, 6 Ia. 190, 195 (attorney held a competent witness to prove the loss of a promissory note sued on, and which was in his possession when lost).

courts of review.⁵⁹ Even where the defendant in a criminal case has made a voluntary confession to the presiding judge the latter may not testify to it.⁶⁰ Mr. Stephen says that "it is doubtful whether a judge is compellable to testify as to anything which came to his knowledge in court as such judge."⁶¹ Mr. Rapalje says, "If the judge sits alone, he cannot be sworn at all; and if he be one of several judges, he ought not to be, unless he leaves the bench during the trial."⁶² This view is sustained by Mr. Taylor.⁶³ It has been held, however, that although the court consists of several judges, if one of them is permitted to testify against objection the judgment will be set aside.⁶⁴ But even in the case of a single presiding judge he may subsequently testify to facts which occurred before him at a former trial.⁶⁵ Thus, a judge or justice of the peace may testify to what a given witness swore to before him at

59. *Randall v. Wadsworth*, 130 Ala. 633, 31 So. R. 555; *Shockley v. Morgan*, 103 Ga. 156, 29 S. E. R. 694; *McMillan v. Andrews*, 10 Ohio St. 112; *State v. DeMalo*, 69 N. J. L. 590, 55 Atl. R. 644; *Rogers v. State*, 60 Ark. 76, 29 S. W. R. 894.

60. *People v. Pratt*, 133 Mich. 125, 94 N. W. R. 754, 67 L. R. A. 923.

61. *Stephen Dig. of Evid.*, art. 111. See also, *R. v. Gazard*, 8 Car. & P. 595.

62. *Rapalje on Wit.*, § 45.

63. *Taylor on Evid.* (10th ed.), § 1379.

64. *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349.

65. *State v. Hindman*, 159 Ind. 586, 65 N. E. R. 911; *State v. Houghton*, 45 Ore. 110, 75 Pac. R. 887.

a former trial.⁶⁶ In a few states there are statutes which expressly make judges competent witnesses. These statutes contain provisions for postponing the trial and having it take place before another judge. Of course, a judge may not be compelled to disclose what occurred in the consulting room; nor may he be compelled to state reasons for his decisions.⁶⁷

§ 49. **Grand jurors.**—It has been held that grand jurors are incompetent to testify to statements made to them in the jury room by a witness, where the purpose is to impeach his credibility.⁶⁸ But this is not the modern rule. As said by Mr. Wharton, "It was at one time supposed that a grand juror was required, by his oath of secrecy, to be silent as to what transpired in the jury room; but it is now held that such evidence, whenever it is material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required."⁶⁹ Where a person is prosecuted for perjury, or for any other crime, committed in the presence of the grand jury, members of that

66. *Zitske v. Goldberg*, 38 Wis. 216.

67. *Noland v. People*, 33 Colo. 322, 80 Pac. R. 887.

68. *Inlay v. Rogers*, 7 N. J. L. 347.

69. 1 Wharton on Evid., § 601. See also to same effect, *State v. McPherson*, 114 Ia. 492, 87 N. W. R. 421; *State v. Wood*, 53 N. H. 484; *Com. v. Mead*, 12 Gray (Mass.) 167, 71 Am. Dec. 741; *State v. Brown*, 26 Oreg. 147, 41 Pac. 1042; *Gordon v. Com.*, 92 Pa. St. 216, 37 Am. Rep. 672; *United States v. Reed*, 2 Blatch. (U. S.) 435; *Way v. Butterworth*, 106 Mass. 75.

body are competent witnesses.⁷⁰ And they are competent to testify to the fact that certain persons did, or did not, testify before them.⁷¹ Moreover, they are competent to testify that certain witnesses acted suspiciously when testifying before them.⁷² They are not competent, however, to testify who voted in favor of the bill of indictment, or who voted against it.⁷³ Nor are they competent to testify to the evidence upon which it was founded.⁷⁴ Moreover, on the ground of public policy, it is not allowable for grand jurors to impeach their finding or to explain their vote.⁷⁵ Thus, they are incompetent to testify that certain witnesses who testified before them were not sworn; or that the evidence upon which the indictment was based was insufficient.⁷⁶ Some decisions hold that, upon a motion to quash an indictment, a grand juror is a competent witness to testify that less than the required number of grand jurors supported the

70. *Izer v. State*, 77 Md. 110, 26 Atl. R. 282; *State v. Fassett*, 16 Conn. 457; *People v. Young*, 31 Cal. 563.

71. *People v. Northey*, 77 Cal. 618, 19 Pac. R. 865, 20 Pac. R. 129; *Com. v. Hill*, 11 Cush. (Mass.) 137.

72. *State v. Broughton*, 7 Ired. (N. C.) 96, 45 Am. Dec. 507.

73. *Com. v. Hill*, *supra*; *State v. Beebe*, 17 Minn. 241; *State v. Fassett*, *supra*.

74. Cases cited in foot-note 73.

75. *State v. Oxford*, 30 Tex. 428; *Hall v. State*, 134 Ala. 90, 32 So. R. 750; *Gordon v. Com.* 92 Pa. St. 216, 37 Am. Rep. 672; *State v. Fassett*, *supra*.

76. Cases cited in foot-note 75.

indictment.⁷⁷ It is probable, however, that the weight of authority is to the contrary.⁷⁸ As to admissions and confessions made before the grand jury, members of that body are competent witnesses.⁷⁹ Generally speaking, however, the proceedings of grand jurors in the jury room are privileged, not only as to the grand jurors themselves, but also as to their stenographers and the district attorney.

§ 50. **Petit Jurors.**—In a decision rendered nearly eighty years ago, Bullard, J., says, "It is every day's practice to swear jurors to give evidence to their fellow jurors."⁸⁰ While there is no rule of the common law which renders a petit juror an incompetent witness, for a petit juror to serve as a witness in a cause in which he is empaneled is now practically unknown.⁸¹ It is to be observed, however, that the oath administered to petit jurors requires them to base their verdict solely upon the evidence in the case. It would be improper, therefore, for a petit juror to

77. *Com. v. Smith*, 9 Mass. 107; *Low's Case*, 4 Me. 439, 16 Am. Dec. 271 and note.

78. *State v. Oxford*, *supra*; *State v. Baker*, 20 Mo. 338; *R. v. Marsh*, 6 Adol. & Ellis 236.

79. *Hinshaw v. State*, 147 Ind. 334; *Kirk v. Garrett*, 84 Md. 383; *United States v. Porter*, 2 Cranch, C. C. 60.

80. *Rondeau v. New Orleans Imp. Bank Co.*, 15 La. 160 (1840).

81. *Savannah, etc., Ry. Co. v. Quo*, 103 Ga. 125; *Howser v. Com.*, 51 Pa. St. 332; *Patterson v. Boston*, 20 Pick. (Mass.) 159; *Wharton v. State*, 45 Tex. 2; *Rex v. Rosser*, 7 Car. & P. 648.

make use of knowledge he may possess, but which has not been given in evidence, in rendering his verdict. Moreover, it would also be improper for him to communicate such knowledge to his fellow jurors. If such knowledge is to be used at all in determining the verdict he should be duly sworn and examined the same as other witnesses.⁸²

A petit juror is a competent witness at a subsequent trial to testify to relevant facts which occurred at a former trial where he served as juror. Thus, he may testify at the subsequent trial as to claims allowed by the jury at the former trial; or, as to testimony given by witnesses.⁸³

While, as a general rule, the proceedings of petit jurors which occur in the jury room are privileged, and not subject to investigation, yet, based upon grounds of public policy, there are some exceptions to this rule. The decisions upon this question, however, are not harmonious. As a general rule, the deliberations of petit jurors in the jury room are inviolable, and the courts refuse to allow them to be disclosed.⁸⁴ Even acts of misconduct in the jury room, by the jurors themselves, which tend to impeach their

82. *Wood River Bank v. Dodge*, 36 Neb. 708; *Anderson v. Barnes*, 1 N. J. L. 203; *R. v. Rosser*, 7 Car. & P. 648.

83. *Piatt v. St. Clair*, 6 Ohio 227.

84. *Woodward v. Leavitt*, 107 Mass. 453; *Sheppard v. Inhab. of Camden*, 82 Me. 535, 20 Atl. R. 91; *Com. v. Meserve*, 156 Mass. 61, 30 N. E. R. 166.

verdict, may not, as a general rule, be shown.⁸⁵ The three chief reasons for this rule are as follows: (1) It prevents jurors from defeating by evidence their own solemn acts under oath. (2) It prevents a dissatisfied juror from destroying a verdict to which he had solemnly assented. (3) It prevents the tampering with jurors after they have rendered their verdict.⁸⁶ In harmony with this rule courts have refused to admit evidence of a petit juror that the verdict was determined by lot;⁸⁷ or by taking an average.⁸⁸ They also have refused to admit evidence of a petit juror that a fellow juror was intoxicated;⁸⁹ or that all of the jurors did not concur in the verdict;⁹⁰ or that a juror misunderstood the court's

85. *Siemens v. Ry. Co.*, 134 Cal. 494, 66 Pac. R. 672 (improper view); *Mattox v. United States*, 146 U. S. 140 (improper use of newspaper and other documents); *People v. Deegan*, 88 Cal. 662, 26 Pac. R. 500 (intoxication of juror); *Rowe v. Canny*, 139 Mass. 41, 29 N. E. R. 219 (improper statements of facts); *Com. v. White*, 147 Mass. 76, 16 N. E. R. 707 (hostility and bias); *Sharp v. Merri-man*, 108 Mich. 454, 66 N. W. R. 372 (hostility and bias).

86. 3 *Graham & Waterman on New Trials* 1428.

87. *Haun v. Wilson*, 28 Ind. 296; *Tucker v. So. Kensington*, 5 R. I. 558; *Sawyer v. Hannibal Ry. Co.* 37 Mo. 240; *Straker v. Graham*, 4 M. & W. 721.

88. *Houk v. Allen*, 126 Ind. 568, 25 N. E. R. 897; *Phillips v. Stewart*, 69 Mo. 149; *Roy v. Gomeys*, 112 Ill. 656; *Dorr v. Flemo*, 12 Pick. (Mass.) 520.

89. *Heller v. People*, 22 Colo. 11, 43 Pac. R. 124; *People v. Deegan*, *supra*.

90. *State v. McNamara*, 100 Mo. 100, 13 S. W. R. 938; *Hallenbeck v. Garst*, 96 Ia. 509, 65 N. W. R. 417; *People v. Kloss*, 115 Cal 567, 47 Pac. R. 459.

charge;⁹¹ or that a juror, who was in ill health, acquiesced in the verdict to be relieved from confinement.⁹² As previously stated, however, the decisions upon this question are not harmonious. According to the early English rule the affidavit of a petit juror was admissible even to impeach his verdict.⁹³ This continued to be the rule down to Lord Mansfield's time when he overturned it. Moreover, he held that for jurors to base their verdict upon chance was a "very high misdemeanor."⁹⁴ Yeates, J., says, "I am opposed to penetrating into the recesses of a jury room through the instrumentality of jurors who are kept together until they have agreed upon their verdict."⁹⁵ The rule of exclusion established by Lord Mansfield has obtained in England from his day to the present. "The general rule is, that affidavits of jurors are not admissible either to support or to impugn their verdict."⁹⁶ "It is entirely against public policy to allow a jurymen to make affidavit of anything that passes in agreeing to a verdict."⁹⁷ "If the affidavits of jurors are to be taken as a state-

91. *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. R. 946; *Christ v. City of Webster*, 105 Ia. 119, 74 N. W. R. 743.

92. *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. R. 273, 52 Am. St. Rep. 665.

93. *Ash v. Ash*, Comberb 357 (1697).

94. *Vaise v. Delaval*, 1 T. R. 11, K. B. (1785).

95. *Cluggage v. Swan*, 4 Binn. 150, 155.

96. *Standewicke v. Hopkins*, 2 D. & L. 502.

97. *Straker v. Graham*, 7 Dowl. 223, 225, 8 L. J. N. S. (Exch.) 86.

ment of something that passed in the jury room, they are clearly not admissible."⁹⁸ And Lord Mansfield's rule is in harmony with the great weight of American authority.⁹⁹ "This rule excludes affidavits to show mistake or error of the jurors in respect to the merits, or irregularity or misconduct, or that they mistook the effect of their verdict, and intended something different."¹⁰⁰

§ 51. **Same. The Iowa rule.**—In a few states, however, including Iowa, Kansas, Illinois, Nebraska, California, Arkansas, Texas and Tennessee, the rule is less rigid.¹ This less rigid rule is also sanctioned by the federal courts. According to this rule, "The affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury-room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent or at-

98. *Raphael v. Bank of England*, 17 C. B. 161, 174.

99. *Cook v. Castner*, 9 Cush. (Mass.) 278; *Com. v. White*, 147 Mass. 76, 16 N. E. R. 707; *Johnson v. Parrotte*, 34 Neb. 26; *Sharp v. Merriman*, 108 Mich. 454, 66 N. W. R. 372; *Mattox v. United States*, 146 U. S. 140.

100. *Dalrymple v. Williams*, 63 N. Y. 363, 20 Am. Rep. 544.

1. *Wright v. Ill. & Miss. Tel. Co.*, 20 Ia. 195; *State v. Whalen*, 98 Ia. 662, 68 N. W. R. 554; *Atchison, T. & S. F. Ry. Co. v. Bayes*, 42 Kan. 609, 22 Pac. R. 741; *Harris v. State*, 24 Neb. 803, 40 N. W. R. 317; *Allison v. People*, 45 Ill. 37; *Polhemus v. Heiman*, 50 Cal. 438 (statutory); *Fain v. Goodwin*, 35 Ark. 109 (statutory); *Anschicks v. State*, 6 Tex. App. 524 (statutory); *Galvin v. State*, 6 Cold. (Tenn.) 283.

torney; that witnesses or others conversed as to the facts or merits of the cause out of court in the presence of the jurors; that the verdict was determined by aggregation and average, or by lot, or game of chance, or other artifice, or improper manner; but such affidavit, to avoid the verdict, may not be received to show any matter which does essentially inhere in the verdict itself, as that he misunderstood the instructions of the court, the statement of the witnesses, or the pleadings in the case; that he was unduly influenced by the statements of his fellow-jurors, or mistaken in his calculations or judgment, or other matters resting alone in the juror's breast."²

This is known as the Iowa rule. Mr. Freeman, the compiler and annotator of "American Decisions," etc., in commenting upon this rule, says: "The rule, as thus adopted by the supreme court of Iowa, seems to be the one best adapted to secure the impartial administration of justice by jury trials. It commends itself for the protection it affords litigants against a verdict obtained by unlawful means, and at the same time it enshrines the deliberations of juries in the jury room with that mantle of secrecy which the policy of the law has always designed to secure, in order that a verdict may be the united judgment of all sworn to try the cause. Much as we might be inclined, however, to adopt this as the better rule, were we permitted to decide, we must yield our opinions to the great weight of

2. *Wright v. Ill. & Miss. Tel. Co.*, *supra*.

modern authority, which is undoubtedly opposed to the admission of affidavits of jurors in any case to show such misconduct on their part as will vitiate their verdict" (citing numerous authorities).³

It has been held that evidence is inadmissible to show misconduct of the bailiff in the jury room.⁴ Some courts, however, have held the contrary.⁵ Testimony that a party to the suit, or his agent, sought to influence the jury has been held admissible. And, as a general rule, the testimony of petit jurors is admissible to support their verdict where their conduct has been assailed.⁶

An important principle which is often lost sight of is, the parol evidence rule is applicable to verdicts as well as to other classes of writings. "Under this principle the testimony or affidavit of a petit juror is not admissible to prove his consultations or motives which resulted finally in his written verdict. It is admissible, however, to prove the precise scope of the issues upon

3. 24 Am. Dec. 477.

4. *Sanitary District v. Culbertson*, 197 Ill. 385, 35 N. E. R. 723.

5. *Heller v. People*, 22 Colo. 11, 43 Pac. R. 124; *Nelms v. State*, 21 Miss. 500, 53 Am. Dec. 94.

6. *Spies v. People*, 122 Ill. 1, 264, 12 N. E. R. 865, 17 N. E. R. 898, 3 Am. St. Rep. 320; *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49 (many cases reviewed); *People v. Murray*, 94 Cal. 212, 29 Pac. R. 494; *Harding v. Whitney*, 40 Ind. 379; *State v. Underwood*, 57 Mo. 40; *State v. Gay*, 18 Mont. 51, 44 Pac. 411.

which the verdict was based; or to prove a mistake on the part of the foreman in declaring the verdict; or a mistake on the part of the clerk in recording it; or to show the invalidity of the verdict owing to the misconduct of the jurors in determining it.”⁷

§ 52. **Arbitrators.**—Arbitrators exercise functions of both court and jury, and concerning some subjects they are incompetent to testify. Thus, except in case of fraud or mistake, arbitrators are not competent witnesses to impeach their award.⁸ An arbitrator is incompetent to testify either to his own misconduct,⁹ or that of his associates.¹⁰ He is also incompetent to testify that he did not actually agree to the award.¹¹ He may testify to circumstances under which the award was made,¹² but may not state the grounds of it.¹³ He is competent to testify to matters material to the issue in a proceeding to enforce the award,¹⁴ or to testify that a given claim was, or was not, taken into consideration

7. Hughes on Evidence 302.

8. Packard v. Reynolds, 100 Mass. 153; Ellison v. Weathers, 78 Mo. 115; Corrigan v. Rockefeller, 67 Ohio St. 354, 66 N. E. R. 95.

9. Claycomb v. Butler, 36 Ill. 100.

10. Tucker v. Page, 69 Ill. 179.

11. Campbell v. Western, 3 Paige (N. Y.) 124.

12. Woodbury v. Northy, 3 Me. 85, 14 Am. Dec. 214.

13. Withington v. Warren, 10 Met. 431.

14. Graham v. Graham, 9 Pa. St. 254, 49 Am. Dec. 557.

in making the award.¹⁵ He may testify in support of the award,¹⁶ and also to acts or declarations of the parties which occurred during the investigation.¹⁷

15. *Hale v. Huse*, 10 Gray (Mass.) 99.

16. *Stone v. Atwood*, 28 Ill. 30.

17. *Graham v. Graham*, *supra*; *Calvert v. Frieбус*, 48 Md. 44.

CHAPTER II.

Privileged Communications.

§ 1. **Definition.**—Privileged communications are those whose disclosure upon the witness stand is not compellable, or even allowable, owing to certain confidential relations existing between the parties. The grounds of the exclusion are public policy and necessity.

§ 2. **Fundamental conditions.**—The four fundamental conditions which are essential to the existence of privileged communications are as follows: (1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be

greater than the benefit thereby gained for the correct disposal of litigation.¹

§ 3. The law of the forum governs.—Whether given communications are privileged or not is determined by the law of the forum. Thus, where the question arises in a federal court it is determined by the law of the state in which the court sits.² And where the examination of a witness occurs* under a commission issued out of a court of a foreign jurisdiction the law of the state where the examination is made governs.³

§ 4. General classification.—Privileged communications are divided into the following four classes: (1) Professional communications. (2) Political communications. (3) Social communications. (4) Judicial communications. These four classes are next discussed in the order given.

§ 5. Professional communications.—At the common law the only professional communications that were privileged were those between attorney and client. An attorney may not disclose communications made to him confidentially by his client in the course of his professional employment without the client's consent.⁴ The

1. Wignmore on Evid., § 2285; 40 Cyc. 2353.

2. Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 S. Ct. 119, 28 L. ed. 708.

3. Matter of Whitlock, 51 Hun (N. Y.) 351, 3 N. Y. Suppl. 855.

4. Matter of Cunnion, 201 N. Y. 123, 94 N. E. R. 648; Lorimer v. Lorimer, 124 Mich. 631, 83 N. W. R. 609; Sheehan v. Allen, 67 Kan. 712, 74 Pac. R. 245; Lauer v. Banning,

basis of the rule is public policy. As said by Shaw, C. J., "The law has considered it the wisest policy to encourage and sanction this confidence by requiring that on such facts the mouth of the attorney shall be forever sealed."⁵

§ 6. **Effect of the rule.**—The rule secures to the client complete freedom in communicating to his attorney all the facts and circumstances relating to his case, and it enables his attorney to acquire a complete understanding of all those facts and circumstances.⁶ An injunction of secrecy by the client is not essential.⁷ Moreover, want of knowledge by the client of the existence of the privilege is immaterial.⁸

§ 7. **Scope of the rule.**—The rule is confined to cases which embody the principle upon which it is based.⁹ As said by Buller, J., "The privilege is confined to the case of counsel, solicitor and attorney, and it must be proved that the information was communicated to the witness in one of those characters."¹⁰ But while the rule is strictly applied courts will not permit it to be cunningly evaded.¹¹

140 Ia. 319, 118 N. W. R. 446; *Smoot v. Judd*, 161 Mo. 673, 61 S. W. R. 84 Am. St. Rep. 738.

5. *Hatton v. Robinson*, 31 Mass. 416, 422.

6. *Hyman v. Grant*, 102 Tex. 50, 112 S. W. R. 1042.

7. *McLean v. Longfellow*, 32 Me. 494, 54 Am. Dec. 599.

8. *McLellan v. Longfellow*, *supra*.

9. *Phillips v. Chase*, 201 Mass. 444, 87 N. E. R. 755, 131 Am. St. Rep. 406.

10. *Wilson v. Rastall*, 4 T. R. 753.

11. *Henry v. Buddecke*, 81 Mo. App. 360.

§ 8. **Same. Rule applicable to intermediaries.**—The rule is applicable not only to attorneys within the scope of their employment as such, but also to persons whose intervention is essential. Thus, it is applicable to interpreters,¹² clerks,¹³ agents¹⁴ or other intermediaries¹⁵ who are essential parties to the communications. It does not apply, however, to law students who are studying in law offices.¹⁶ It is applicable not only to confidential communications between the client and an agent of the attorney,¹⁷ but also to those between the attorney and an agent of the client.¹⁸ Thus, it is applicable to communications by a wife to her husband's attorney where she acts as her husband's agent.¹⁹ It is also applicable to communications between an officer of a corporation and the attorney for the corporation.²⁰

§ 9. **Purpose of the communication.**—The purpose of the communication, to come within

12. *Hawes v. States*, 88 Ala. 37, 7 So. R. 302.

13. *Hilarg v. Minneapolis St. Ry. Co.*, 104 Minn. 432, 116 S. N. W. R. 933; *Hawes v. State*, *supra*.

14. *Hawes v. States*, *supra*; *Com. v. Best*, 180 Mass. 492, 62 N. E. R. 748.

15. *Hawes v. State*, *supra*.

16. *Barnes v. Harris*, 61 Mass. 576.

17. *Hawes v. State*, *supra*.

18. *Indianapolis v. Scott*, 72 Ind. 196; *Philadelphia Fire Assoc. v. Fleming*, 78 Ga. 733, 3 S. E. R. 420.

19. *Leyner v. Leyner*, 123 Ia. 185, 98 N. W. R. 628. See also, *Scott v. Ives*, 22 Misc. (N. Y.) 749, 51 N. Y. Suppl. 49.

20. *Ex parte Abbott*, 7 Montreal Legal News, 318.

the rule of privilege, must be to seek legal advice. Where the services performed by the attorney are merely to act as a notary in taking an acknowledgement the rule does not apply.²¹ And it has been held that where an attorney acts merely in the capacity of conveyancer there is no exemption.²² Thus, the mere fact that an attorney drew a deed for a client is not privileged.²³ On the other hand it has been held that the rule of privilege does apply to communications between attorney and client, made while the attorney is engaged in drawing a deed,²⁴ an assignment of a mortgage,²⁵ an affidavit,²⁶ an insurance policy,²⁷ or a power of attorney,²⁸ provided the statements have a material bearing upon the subject matter involved. Where a person submits to an attorney an oral or written statement of actual facts and solicits an opinion

21. *Lukin v. Halderson*, 24 Ind. App. 645, 57 N. E. R. 254; *Aultman v. Daggs*, 50 Mo. App. 280.
22. *Hatton v. Robinson*, 31 Mass. 416, 422; *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371.
23. *Potter v. Barringer*, 236 Ill. 224, 86 N. E. R. 233; *Bremens v. Hall*, 131 N. Y. 160, 29 N. E. R. 1009; *In re Downing*, 118 Wis. 581, 95 N. W. R. 876; *Conway v. Rock*, 139 Ia. 162, 117 N. W. R. 273.
24. *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513; *Barry v. Corille*, 7 N. Y. S. 36.
25. *Moore v. Bray*, 10 Pa. St. 519.
26. *Williams v. Fitch*, 18 N. Y. 546; *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295.
27. *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. R. 165.
28. *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 595, 49 Am. Dec. 189.

thereon, both the statement of facts²⁹ and the opinion are privileged.³⁰ But where the statement is merely fictitious the rule is otherwise.³¹

In a contest over a will, the attorney who drew it, and was a subscribing witness, may testify to the circumstances immediately surrounding its execution; but beyond this he may not disclose professional communications between himself and the deceased.³² He may not disclose information acquired from documents submitted to him for inspection or custody.³³ It has been held that an attorney who draws a will may not even disclose the name of the party who instructed him to do so.³⁴ But this is doubtful. He may not disclose instructions given him by a client to enable him to carry out the provisions of the latter's will.³⁵

While communications whose purpose is illegal are not privileged, yet communications made to an attorney in his professional capacity after the commission of a crime are privileged.³⁷

29. *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627 and note.

30. *Hughes v. Biddulph*, 4 Russ. 190.

31. *Haley v. Bank*, 21 Nev. 127.

32. *Re Bedlow's Will*, 67 Hun (N. Y.) 408, 51 N. Y. State Rep. 782.

33. *Mathews v. Haagland*, 48 N. J. Eq. 455.

34. *Re McCarthy's Will*, 48 N. Y. State Rep. 315.

35. *Re Gagan's Will*, 66 Hun (N. Y.) 632, 49 N. Y. State Rep. 366.

36. *Matter of Coleman*, 111 N. Y. 220.

37. *State v. James*, 34 S. C. 49; *Alexander v. United States*, 138 U. S. 353.

Communications by mail between attorney and client, that are confidential in their nature, are privileged.³⁸ Also papers executed by them in connection with the professional business.³⁹ Where the client testifies in his own behalf he may be asked if he communicated to his attorney the statements made by him on the stand.⁴⁰

While the attorney is precluded from disclosing any information acquired *professionally*, the rule is otherwise as to information acquired by observation or otherwise, where such information is not acquired within the scope of the professional relation. The mere fact that the information relates to, or involves, the act of his client does not render the information privileged.⁴¹ As regards communications between a husband and an attorney the wife of the former should not be compelled to disclose them.⁴² In a breach of promise case the defendant can be compelled to disclose whether or not he turned over to his attorney all the letters he received from the plaintiff.⁴³ Where an attorney for a corporation becomes one of its directors he may

38. *Selden v. State*, 75 Wis. 271.

39. *Genet v. Ketcham*, 62 N. Y. 626.

40. *Barker v. Kuhn*, 38 Ia. 395; *State v. White*, 19 Kan. 445, 27 Am. Rep. 137 and note.

41. *State v. Stone*, 65 N. H. 124, 18 Atl. R. 654. See also, *Kaut v. Kessler*, 114 Pa. St. 603, 7 Atl. R. 586; *Chillcothe Ferry Road & Bridge Co. v. Jameson*, 48 Ill. 281.

42. *State v. Bell*, 212 Mo. 111, 111 S. W. R. 24.

43. *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. R. 308, 11 L. R. A. 784.

be compelled to disclose his knowledge of its affairs.⁴⁴ Where a married woman consults her husband's attorney professionally in regard to her separate estate the communications are privileged. In such case the latter is regarded as the attorney of both.⁴⁵ Where a client and a third person consult an attorney in regard to the law applicable to a transaction pending between them the communications are privileged as to all three persons.⁴⁶ Where an attorney acts merely in the capacity of abstractor of titles there is no exemption.⁴⁷ But where he acts in a professional capacity he may not disclose communications which relate even to the drafting of an instrument.⁴⁸

An attorney may not disclose professional advice his client has received from him.⁴⁹ He may testify to his client's mental condition,⁵⁰ especially when his knowledge thereof is acquired outside of the professional relation.⁵¹ But he

44. *Matter of Robinson*, 140 N. Y. App. Div. 329, 125 N. Y. Suppl. 193.

45. *Scranton v. Stewart*, 52 Ind. 68.

46. *Hartness v. Brown*, 21 Wash. 655, 59 Pac. R. 491.

47. *Stallings v. Hullum*, 79 Tex. 421, 15 S. W. R. 677.

48. *Gruber v. Baker*, 20 Nev. 453, 23 Pac. R. 859, 9 L. R. A. 302; *Hollenbeck v. Todd*, 119 Ill. 543, 8 N. E. R. 829; *Barry v. Coville*, 129 N. Y. 302, 29 N. E. R. 307.

49. *Higbee v. Dresser*, 103 Mass. 523; *People v. Hillhouse*, 80 Mich. 580, 45 N. W. R. 484; *Dewey v. Komar*, 21 S. D. 117, 110 N. W. R. 90.

50. *Boyal v. Robinson*, 129 Wis. 567, 109 N. W. R. 623; *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. R. 245.

51. *Sheehan v. Allen*, *supra*.

may not disclose confidential matters, knowledge of which he acquired during a consultation, even when such matters constitute the foundation of his opinion.⁵² He may be compelled to testify that he rendered professional services for a given person,⁵³ concerning a certain matter.⁵⁴ And an affidavit prepared by him for his client is not privileged.⁵⁵

§ 10. Communications made to third party.—Where communications are made between an attorney and a third party, concerning the business of the attorney's client, they are not privileged.⁵⁶ Moreover, this rule applies even where the third party is a witness of the client.⁵⁷ But communications between two or more attorneys, who act on behalf of the same client in regard to the same rights, liabilities, etc., are privileged.⁵⁸

§ 11. Retainer fee.—It has been held that where a retainer fee is not contemplated com-

52. *Sheehan v. Allen*, *supra*.

53. *In re Seip*, 163 Pa. St. 423, 30 Atl. R. 226, 43 Am. St. Rep. 803; *Alger v. Turner*, 105 Ga. 178, 31 S. E. R. 423; *White v. State*, 86 Ala. 69, 5 So. R. 674.

54. *Elliott v. Elliott*, (Neb. 1902), 92 N. W. R. 1006.

55. *In re Provin*, 161 Mich. 28, 125 N. W. R. 743.

56. *King v. Ashley*, 179 N. Y. 281, 72 N. E. R. 106; *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. R. 460.

57. *Rockford v. Falver*, 27 Ill. App. 604; *Lalance, etc., Mfg. Co. v. Haberman Mfg. Co.*, 57 Fed. R. 563. *Contra*, *Rosebud v. State*, 50 Tex. Cr. R. 475, 98 S. W. R. 858.

58. *Missouri, etc., Ry. Co. v. Williams*, 43 Tex. Civ. App. 549, 96 S. W. R. 1087; *Jones v. Nautahala Marble, etc., Co.* 137, N. C. 237, 49 S. E. R. 94.

munications between attorney and client are not privileged.⁵⁹ But this view is erroneous and not in harmony with the general rule.⁶⁰ Nor is it essential that any fee be charged or received.⁶¹ It is to be observed, however, that the fact that no fee was contemplated or paid would tend to show that the relation of attorney and client did not exist.⁶²

§ 12. **Communications before or after the relation.**—To render this class of communications privileged, the relation of attorney and client must exist at the time the communications are made, or be in contemplation of the parties at that time. Those made either before,⁶³ or after,⁶⁴ are not privileged. But where they are made by a prospective client, whose purpose is to employ the attorney or obtain legal advice, and finally the attorney declines a retainer, or the prospective client decides not to employ the

59. *De Wolf v. Strader*, 26 Ill. 225.

60. *State v. Herbert*, 63 Kan. 516, 66 Pac. R. 235; *State v. Snowden*, 23 Utah, 318, 65 Pac. R. 479; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. R. 848.

61. *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. R. 245; *Bruley v. Garvin*, 105 Wis. 625, 81 N. W. R. 882, 76 Am. St. Rep. 923; *Mack v. Sharp*, 138 Mich. 448, 101 N. W. R. 631, 5 Am. Cas. 109.

62. *Thompson v. Kilborne*, 28 Vt. 750, 67 Am. Dec. 742.

63. *State v. Smith*, 138 N. C. 700, 50 S. E. R. 859; *Jennings v. Sturdevant*, 140 Ind. 641, 40 N. E. R. 61.

64. *State v. Herbert*, 63 Kan. 516, 66 Pac. R. 235; *In re Turner*, 167 Pa. St. 609, 31 Atl. R. 867; *Hanson v. Kline*, 136 Ia. 101, 113 N. W. R. 504.

attorney, the communications are privileged.⁶⁵ Moreover, the fact that the attorney is subsequently employed by the adverse party does not change the rule.⁶⁶

§ 13. **Limitations of the rule.**—Communications to be privileged must come within the scope of professional intercourse.⁶⁷ Communications between an attorney and another person, where the former acts merely as a friend, are not privileged.⁶⁸ Nor those which are collateral to the subject matter of the discussion.⁶⁹ Nor those which relate merely to the existence of a fact.⁷⁰ Communications made to another, in the erroneous belief that he is an attorney, are not privileged;⁷¹ unless the communications are procured by fraud.⁷² Information acquired by an

65. *Surface v. Bentz*, 228 Pa. St. 610, 77 Atl. R. 922; *Thorp v. Goewey*, 85 Ill. 611; *Hanson v. Kline*, 136 Ia. 101, 113 N. W. R. 504; *Peek v. Boone*, 90 Ga. 769, 17 S. E. R. 66.

66. *Cross v. Riggins*, 50 Mo. 335.

67. *In re Turner's Estate*, 167 Pa. St. 609; *Union Pacific Ry. Co. v. Day*, 68 Kan. 726. See also, note, 66 Am. St. Rep. 220.

68. *Sargent v. Johns*, 206 Pa. St. 386, 55 Atl. R. 1051; *State v. Swafford*, 98 Ia. 362, 67 N. W. R. 284; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. R. 336.

69. *State v. Mewherter*, 46 Ia. 88.

70. *Plano Mfg. Co. v. Frawley*, 68 Wis. 577, 32 N. W. R. 768.

71. *Barnes v. Harris*, 7 Cush. (Mass.) 576, 54 Am. Dec. 734; *Sample v. Frost*, 10 Ia. 266.

72. *State v. Russell*, 83 Wis. 330, 53 N. W. R. 441; *People v. Barker*, 60 Mich. 277, 27 N. W. R. 539, 1 Am. St. Rep. 501.

attorney from sources other than his client are not privileged.⁷³

§ 14. Rule where several persons employ the same attorney.—Where several persons employ the same attorney in regard to the same matter their communications are privileged with respect to a common adversary, or third persons;⁷⁴ but not as among themselves.⁷⁵ In the latter case they are not privileged even when the interests of the several parties are adverse to each other.⁷⁶

§ 15. Communications with a patent solicitor.—Communications with a patent solicitor who is not an attorney are not privileged.⁷⁷ But where a solicitor of patents acts in the capacity of assistant to counsel, rather than in the capacity of witness, communications between him and the counsel, pertaining to the litigation, are privileged.⁷⁸

§ 16. Communications with a judge.—Where a judge undertakes to give legal advice to a per-

73. *King v. Tunstall*, 124 Ala. 268, 27 So. 420; *King v. Ashley*, 179 N. Y. 106, 72 N. E. R. 106.

74. *Minard v. Stillman*, 31 Oreg. 164, 49 Pac. R. 976, 65 Am. St. Rep. 815; *Brown v. Moosie Mountain Coal Co.*, 211 Pa. St. 579, 61 Atl. R. 76.

75. *Doheny v. Lacy*, 168 N. Y. 213, 61 N. E. R. 255; *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. R. 782.

76. *Shove v. Martine*, 85 Minn. 29, 88 N. W. R. 254, 412; *Holmes v. Bloomingdale*, 72 N. Y. App. Div. 627, 76 N. Y. Suppl. 182.

77. *Brungger v. Smith*, 49 Fed. R. 124.

78. *Lalance, etc. Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. R. 563.

son and the latter thereby acquires the confidence of the judge and makes a confession to him, the communication is privileged.⁷⁹ The basis of this rule is public policy.

§ 17. Relation of the communication to certain matters.—According to some early decisions a communication to be privileged must relate to pending or expected litigation.⁸⁰ But according to the modern view this is not essential. A communication is privileged if it comes within the scope of the professional relation.⁸¹ Ordinarily, the contract between an attorney and client as to the fee to be paid,⁸² or the terms of payment,⁸³ is not privileged. But where a disclosure would tend to fasten a crime on the client,⁸⁴ or tend to subject him to a civil liability,⁸⁵ the contract is privileged. Thus, where the client was on trial for the larceny of one hundred and sixty dollars "of current silver coin of the United States," the trial court erred in allowing the defendant's attorney to testify to the kind of money paid him for his professional ser-

79. *People v. Pratt*, 133 Mich. 125, 94 N. W. R. 752, 67 L. R. A. 923 and note.

80. *Whitinger v. Barney*, 30 N. Y. 330, 86 Am. Dec. 385.

81. *Root v. Wright*, 84 N. Y. 72, 38 Am. Rep. 495; *Moore v. Bray*, 10 Pa. St. 519; *Brown v. Butler*, 71 Conn. 576, 42 Atl. R. 654.

82. *Strickland v. Capital City Mills*, 74 S. C. 16, 54 S. E. R. 220, 7 L. R. A. N. S. 426; *Smithwick v. Evans*, 24 Ga. 461.

83. Cases cited in foot-note 82.

84. *State v. Dawson*, 90 Mo. 149, 1 S. W. R. 827.

85. *Liggett v. Glenn*, 51 Fed. R. 381, 2 C. C. A. 286.

vices (forty-five dollars in silver and five dollars in gold).⁸⁶ Again, where a person was sued on his stock subscription, and he and others signed a written contract to pay their attorney a given amount "by us *pro rata* on the amount of stock subscribed by us as set opposite our names," the contract was privileged, because it tended to subject the defendant to a civil liability.⁸⁷

§ 18. Matters which are not privileged.—The name and address of the client are not privileged. The attorney may be either permitted or compelled to disclose them.⁸⁸ It has been held, however, that an attorney who is not acting in the case may not be compelled to disclose the names of clients whom he previously advised concerning matters pertaining to the litigation.⁸⁹ Where the client admits on the stand that he communicated certain facts to his attorney he may be compelled to state when the communication was made.⁹⁰ Where his statements to the attorney are to be communicated to a third party they are

86. *State v. Dawson, supra.*

87. *Liggett v. Glenn, supra.*

88. *Com. v. Bacon*, 135 Mass. 521; *Mobile, etc., Ry. Co. v. Yeates*, 67 Ala. 164; *United States v. Lee*, 107 Fed. R. 702; *Matter of Malcolm*, 129 N. Y. App. Div. 226, 113 N. Y. Suppl. 666.

89. *Matter of Shawmut Min. Co.*, 94 N. Y. App. Div. 156, 87 N. Y. Suppl. 1059. See also, *Walton v. Fairchild*, 4 N. Y. Suppl. 552, and *Schwarz v. Robinson*, 129 N. Y. App. Div. 404, 113 N. Y. Suppl. 995.

90. *Tibbet v. Sue*, 125 Cal. 544, 58 Pac. R. 867.

not privileged.⁹¹ Nor are they privileged where they are in the nature of a threat.⁹²

As regards communications between an attorney and a client since deceased, they are not privileged where the parties to the suit all claim under the client.⁹³ Thus, in a suit between the devisees of a will, communications made to an attorney by the testator concerning the will are not privileged.⁹⁴ Nor, according to the weight of authority, where the issue is the validity or genuineness of the will;⁹⁵ especially where the attorney is one of the subscribing witnesses.⁹⁶ Nor where the issue is the existence and contents of a lost will,⁹⁷ or the construction of a will.⁹⁸ Nor where the attorney is a subscribing witness

91. *Scott v. Harris*, 113 Ill. 447; *Phillips v. Chase*, 201 Mass. 444, 87 N. E. R. 755, 131 Am. St. Rep. 406; *Bruce v. Osgood*, 113 Ind. 360, 14 N. E. R. 563.

92. *Pearson v. State*, 56 Tex. Cr. Cr. 607, 120 S. W. R. 1004.

93. *Kern v. Kern*, 154 Ind. 29, 55 N. E. R. 1004; *Phillips v. Chase*, 201 Mass. 444, 87 N. E. R. 755, 131 Am. St. Rep. 406.

94. *Glover v. Patten*, 165 U. S. 394, 17 S. Ct. 411, 41 L. ed. 760.

95. *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. R. 726, 34 Am. St. Rep. 257, 17 L. R. A. 188 and note; *In re Nelson*, 132 Cal. 182, 64 Pac. R. 294; *In re Loree*, 158 Mich. 372, 122 N. W. R. 623. *Contra*, *Loder v. Whelphley*, 111 N. Y. 239, 18 N. E. R. 874.

96. *In re Coleman*, 111 N. Y. 220, 19 N. E. R. 71; *McMaster v. Scriven*, 85 Wis. 162, 55 N. W. R. 149, 39 Am. St. Rep. 828; *Pence v. Waugh*, 135 Ind. 143, 34 N. E. R. 860; *In re Mullin*, 110 Cal. 252, 42 Pac. R. 654.

97. *Kern v. Kern*, *supra*.

98. *In re Dominici*, 151 Cal. 181, 90 Pac. R. 448.

to a deed, or other document.⁹⁹ Nor as regards pleadings which have been filed, or have been otherwise made public.¹⁰⁰ Nor as regards the fact of the attorney's employment by the client, and when it began and terminated.¹ Nor as regards the terms of a compromise made by the attorney to his client's creditors.²

Where third persons overhear communications between an attorney and client the communications are not privileged. And this rule obtains even when the third persons are eavesdroppers.³

§ 19. Privilege for client's benefit. Waiver.—The privilege of secrecy is for the benefit of the client and not for the benefit of the attorney. Hence the latter cannot waive it. It can be waived only by the client or by someone who stands in his place.⁴ Dr. Greenleaf says, "The seal of the law, once fixed upon them (the communications) remains forever, unless removed by the party himself, in whose favor it was there placed."⁵ This rule, however, is not without exceptions. The personal representative of a deceased client may exercise in favor of the latter's

99. *Hughes v. Boone*, 102 N. C. 137; *Robson Kemp*, 5 Esq. 52

100. *Burnham v. Roberts*, 70 Ill. 19.

1. *Shaughnessy v. Fogg*, 15 La. Am. 330.

2. *McTavish v. Denning*, Auth. N. P. (N. Y.) 155.

3. *People v. Buchanan*, 145 N. Y. 1, 39 N. E. R. 846.

4. 1 Greenl. on Evid., § 243.

5. 1 Greenl. on Evid., § 243.

estate the right to waive the client's privilege.⁶ And even an heir at law, in a contest with devisees, may waive the privilege. Some decisions, however, erroneously hold the contrary. As said by Ladd, J., "These decisions are based on the ground that the executor or devisee represents the deceased, and the evidence is offered to sustain the will which it is the policy of the law to maintain. The particular vice in the reasoning of these cases, in making the distinction between the heir at law and the devisee, is the assumption that the paper in dispute is the will of the deceased . . . The very purpose of the contest is to determine whether the deceased in fact made a will, who shall be his representative, and who is entitled to his estate. . . . And no one can be said to represent the deceased in that contest, for he could only be interested in having the truth ascertained, and his estate can only be protected by establishing or defeating the instrument as the truth so ascertained may require."⁷

§ 20. Communications between physician and patient.—As previously stated, the only class of communications that are privileged at common law are those between attorney and client. But by statute, communications between physician

6. *Brooks v. Holden*, 175 Mass. 137, 55 N. E. R. 802; *Scott v. Harris*, 113 Ill. 447; *Glover v. Patten*, 165 U. S. 394.
7. *Winters v. Winters*, 102 Ia. 51, 58 (The communications in this case were between a physician and his patient, but the reasoning is equally applicable to a case where the communications were between an attorney and his client).

and patient are also privileged.⁸ To render this class of communications privileged three conditions must exist. (1) The alleged physician or surgeon must be one in fact.⁹ (2) The professional relation of physician and patient must actually exist between the parties when the communications are made.¹⁰ (3) The physician must be acting at that time in his professional capacity.¹¹

It is not essential that the physician be employed by the patient.¹² Nor is it essential that the patient consent to be treated. The communications may be privileged even though the patient objects to being treated. As said by Vann,

8. *People v. Austin*, 199 N. Y. 446, 93 N. W. R. 57; *Green v. St. Louis Term. Ry. Assoc.*, 211 Mo. 18, 109 S. W. R. 715; *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. R. 462; *Krapp v. Metro. L. Ins. Co.*, 143 Mich. 369, 106 N. W. R. 1107, 114 Am. St. Rep. 651; *Laner v. Banning*, 140 Ia. 319, 118 N. W. R. 446; *In re Young*, 33 Utah 382, 94 Pac. R. 731, 126 Am. St. Rep. 843, 17 L. R. A. N. S. 108, 14 Ann. Cas. 596.
9. *Wiel v. Cowles*, 45 Hun (N. Y.) 307; *People v. De France*, 104 Mich. 563, 62 N. W. R. 709, 28 L. R. A. 139.
10. *People v. Koerner*, 154 N. Y. 355, 48 N. E. R. 730; *Siefert v. State*, 160 Ind. 464, 67 N. E. R. 100, 98 Am. St. Rep. 340; *Griffiths v. Metro. St. Ry. Co.*, 171 N. Y. 106, 63 N. E. R. 808; *Cooley v. Foltz*, 85 Mich. 47, 48 N. W. R. 176.
11. *Bower v. Bower*, 142 Ind. 194, 41 N. E. R. 523. Cases cited in foot-note 10.
12. *Batta v. Ry. Co.*, 124 Ia. 623, 100 N. W. R. 543 (defendant's physician); *People v. Schnyler*, 106 N. Y. 298 (jail physician); *Meyer v. Supreme Lodge K. P.*, 178 N. Y. 63, 70 N. E. R. 111, 64 L. R. A. 839, 198 U. S. 508; *Obermeyer v. Logeman Chair Mfg. Co.*, 229 Mo. 97, 129 S. W. R. 209.

J., "When one who is sick unto death is in fact treated by a physician as a patient even against his will, he becomes a patient of that physician by operation of law. The same is true of one who is unconscious and unable to speak for himself. If the deceased had been in a comatose state when the physician arrived the professional relation could not be questioned. . . . The fact of treatment is the decisive test in this case."¹³ Actual treatment by the physician in his professional capacity is sufficient to render the communications privileged.¹⁴

Statements as to collateral matters are not privileged.¹⁵ The privilege does not extend to matters which are not in their nature confidential, and where their disclosure would not constitute a breach of professional confidence.¹⁶ Nor does it extend to information acquired by the physician for a purpose other than professional treatment.¹⁷ Thus, where a physician examines a female child, alleged to have been

13. *Meyer v. Supreme Lodge K. P.*, *supra* (patient had attempted to commit suicide and endeavored to drive the physician away).

14. Cases cited in foot-note 12.

15. *Hoyt v. Hoyt*, 112 N. Y. 493, 20 N. E. R. 402. But see *Birmingham Ry. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748.

16. *Hamilton v. Crowe*, 175 Mo. 634, 75 S. W. R. 389; *Siefert v. State*, 160 Ind. 464, 67 N. E. R. 100, 98 Am. St. Rep. 340; *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. R. 89.

17. *James v. State*, 124 Wis. 130, 102 N. W. R. 320; *Clark v. State*, 8 Kan. App. 782, 61 Pac. R. 814; *In re Bruendl*, 102 Wis. 45, 78 N. W. R. 169.

raped, for the purpose of determining whether she had a venereal disease, information acquired by the physician is not privileged.¹⁸ Where a physician examines an injured person for the sole purpose of acquiring information to enable him to testify in a personal injury case the information so acquired is not privileged.¹⁹ This view, however, has been repudiated.²⁰ But it seems to be supported by the weight of authority.²¹

Where a physician treats a woman, or gives her advice, with the view of illegally procuring a miscarriage, the communications are not privileged.²² But where the treatment or advice is not illegal, as where the purpose of performing the act is to save the woman's life, the communications are privileged.²³

Information acquired by a physician, while

18. *James v. State, supra.*

19. *Arnold v. Maryville*, 110 Mo. App. 254, 85 S. W. R. 107.

20. *Doran v. Cedar Rapids, etc., Ry. Co.*, 117 Ia. 442, 90 N. W. R. 815.

21. *Anderson v. Minneapolis, etc., Ry. Co.*, 103 Minn. 184, 114 N. W. R. 744 (In this case the physician also treated the injured person professionally, and the court held that the information he acquired was not necessarily privileged).

22. *McKenzie v. Banks*, 94 Minn. 496, 103 N. W. R. 497; *Siefert v. State, supra*; *Hewett v. Prime*, 21 Wend. (N. Y.) 79.

23. *Guptill v. Verback*, 58 Ia. 98, 12 N. W. R. 125 (In this case the court says: "It is not unlawful to produce the miscarriage of a pregnant woman, if it becomes necessary to do so in order to save her life.").

engaged in treating a patient as to his physical²⁴ or mental²⁵ condition is privileged. In the absence of evidence to the contrary, the professional communications in such case are presumed to be in furtherance of a lawful purpose.²⁶ Thus, in the case last cited, the action was for breach of promise of marriage, and the court refused to allow a physician, called by the defense, to testify that the plaintiff had consulted him with reference to procuring a miscarriage. In this case the court of review said: "It is not unlawful to produce the miscarriage of a pregnant woman if it becomes necessary to do so to save her life." But a physician may be compelled to disclose the fact that a given woman requested him to commit an abortion on her.²⁷ And a physician may be compelled to disclose the fact that another physician requested him to aid in producing an abortion or miscarriage.²⁸ Where a physician examines a person professionally and gains information thereby, the information so gained is

24. *Finnegan v. Sioux City*, 112 Ia. 232, 83 N. W. R. 907; *Heuston v. Simpson*, 115 Ind. 62, 17 N. E. R. 261, 7 Am. St. Rep. 409.

25. *In re Meyer*, 184 N. Y. 54, 76 N. E. R. 920, 6 Am. Cas. 26; *Matter of Budan* 156 Cal. 230, 104 Pac. R. 442.

26. *Guptill v. Verback*, 58 Ia. 98, 100, 12 N. W. R. 125. See also, *Post v. State*, 14 Ind. App. 452, 42 N. E. R. 1120.

27. *Seifert v. State*, *supra*.

28. *State v. Smith*, 99 Ia. 26, 68 N. W. R. 428, 61 Am. St. Rep. 219.

privileged, though he does not treat the patient.²⁹

Upon an inquisition as to the lunacy of a person a physician who examines him upon that point may testify.³⁰ To show that a person was not in good health during a given time the physician who treated him may testify as to the number of visits he made during that period, and their dates.³¹ Information of a person's physical or mental condition, gained by a physician either before or after he treated him professionally, is not privileged.³² Where the prosecuting attorney sends a physician to examine a prisoner as to his sanity the information acquired by the physician is not privileged.³³ But where a physician, while serving a person in a professional capacity, acquires a knowledge of his condition, the information as acquired is privileged, even as to the sobriety of his patient.³⁴ A physician may not testify that his patient had a venereal disease while he was treating him.³⁵ Nor, in a suit by a husband for an absolute divorce on the ground of adultery, may a physician

29. *Nelson v. Oneida*, 156 N. Y. 219, 50 N. E. R. 802, 66 Am. St. Rep. 556.

30. *Nesbit v. People*, 19 Colo. 441.

31. *Patten v. United Life & Acc. Ins. Ass'n*, 45 N. Y. State Rep. 661, 133 N. Y. 450.

32. *Re Lowenstein's Estate*, 51 N. Y. Rep. 423.

33. *People v. Nino*, 149 N. Y. 317.

34. *Kling v. Kansas City*, 27 Mo. App. 231; *Coolley v. Folz*, 85 Mich. 47.

35. *Sloan v. N. Y. Cent. Ry. Co.*, 45 N. Y. 125.

testify to conversations with the wife, while he was treating her; showing her guilty of the charge of adultery.³⁶ A physician may not testify that when he ceased treating a patient the latter was free from disease;³⁷ but he may testify that the patient was cured of the ailment for which he was treated.³⁸

Where a patient has more than one physician treat him, and he calls one of them to the stand in his own behalf, the adverse party is not thereby entitled to call another of the attending physicians.³⁹ And where two physicians are in partnership and one of them is employed to treat a patient, conversations between the patient and his physician at the office, which are overheard by the other physician, are privileged.⁴⁰

Where a physician attends a patient in the double capacity of friend and physician, and he is unable to separate information acquired by him in the one capacity from that acquired in the other capacity, the information acquired in both capacities is privileged.⁴¹ But where a physician visits a person merely in the capacity of a friend, the communications between them are not privileged.

36. *Hun v. Hun*, 1 N. Y. S. C. (T. & C.) 499.

37. *People v. Schnyler*, 106 N. Y. 298.

38. *Edington v. Etna Life Co.* 77 N. Y. 564.

39. *Mellon v. Mo. Pac. Ry. Co.*, 105 Mo. 455.

40. *Dittrick v. Detroit*, 98 Mich. 245; *Ætna Life Ins. Co. v. Deming*, 123 Ind. 384.

41. *Van Allen v. Gordon*, 83 Hun (N. Y.) 379.

Where a physician makes an examination on behalf of the adverse party,⁴² or by direction of the court,⁴³ the information so obtained is not privileged.

Where a person considers himself still a patient, but the physician considers the patient discharged, communications between them are privileged.⁴⁴

It has been held that a statement made to a physician relative to the circumstances of an accident are privileged;⁴⁵ but there is no privilege as to collateral matters.⁴⁶ The contrary, however, has been held.⁴⁷

Where a patient sues his physician for malpractice the latter may testify as to relevant facts.⁴⁸

A physician may testify to the mere fact that he treated a patient, and as to the number of

42. *People v. Glover*, 71 Mich. 307, 38 N. W. R. 874; *State v. Height*, 117 Ia. 650, 91 N. W. R. 935, 94 Am. St. Rep. 323; *People v. Sliney*, 137 N. Y. 570, 33 N. E. R. 150; *Nesbit v. People*, 19 Colo. 441, 36 Pac. R. 221.

43. *People v. Sliney*, *supra*; *People v. Kemmler*, 119 N. Y. 580, 24 N. E. R.

44. *Patterson & Son v. Cole*, 67 Kan. 441, 73 Pac. R. 54.

45. *Pennsylvania Co. v. Marion*, 123 Ind. 415.

46. *Hoyt v. Hoyt*, 112 N. Y. 493, 20 N. E. R. 402.

47. *Birmingham Ry. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748.

48. *Cramer v. Hurt*, 154 Mo. 112, 55 S. W. R. 258, 77 Am. St. Rep. 752; *Lane v. Boicourt*, 128 Ind. 420, 27 N. E. R. 1111, 25 Am. St. Rep. 442.

visits made.⁴⁹ A hospital physician may testify to information acquired while acting in that capacity. And a physician may testify to information acquired from a person from mere personal acquaintance.⁵⁰

Where two or more physicians attend the same patient, communications between them concerning his condition or treatment are privileged.⁵¹ A physician may not disclose the nature of his patient's ailments;⁵² nor may he disclose information acquired by him as to physical defects or degrading marks on his patient;⁵³ nor information as to the ingredients of the prescriptions given his patient.⁵⁴ But a physician may testify as to an autopsy of the body of a person whom he had treated. "A dead man is not a 'patient', capable of sustaining the relation of confidence towards his physician which is the foundation of the rule given in the statute, but is a mere piece of senseless clay which has

49. *Price v. Ins. Co.*, 90 Minn. 264, 95 N. W. R. 1118; *Sovereign Camp v. Grandon*, 64 Neb. 39, 89 N. W. R. 448; *Patten v. United Life & Acc. Assn.*, 133 N. Y. 450; *Ditt-rich v. Detroit*, 98 Mich. 245.

50. *Fisher v. Fisher*, 129 N. Y. 654.

51. *State v. Smith*, 99 Ia. 26, 61 Am. St. Rep. 219.

52. *Nelson v. Nederland Life Ins.' Co.*, 110 Ia. 600; *Lammi-man v. Detroit Citizens' St. Ry. Co.*, 112 Mich. 602; *Sloan v. N. Y. Cent. Ry. Co.*, 45 N. Y. 125.

53. *Kling v. Kansas City*, 27 Mo. App. 231.

54. *Nelson v. Nederland Life Ins. Co.*, *supra*.

passed beyond the reach of human prescription, medical or otherwise."⁵⁵

A physician may give an expert opinion based upon a hypothetical question, provided it does not disclose information acquired by him while treating a patient professionally.⁵⁶

Where a party desires to prevent testimony of privileged matters from reaching the jury he must interpose an objection when it is offered.⁵⁷ The objection must be made, however, by the party for whose benefit the privilege exists.⁵⁸ He may, of course, waive his privilege, either orally or in writing.⁵⁹ A presumption exists that all information given the physician by his patient is to aid him in prescribing proper treatment.⁶⁰ The objector, however, has the burden of showing that the testimony offered is privileged.⁶¹

Where a physician sues his patient for the value of professional services rendered the rule of privilege applies.⁶²

Ordinarily, the rule of privilege is applicable

55. *Harrison v. Sutter Ry. Co.*, 116 Cal. 156, 47 Pac. R. 1019.

See also, *Ossenkop v. State*, 86 Neb. 539, 126 N. W. R. 72.

56. *Crago v. Cedar Rapids*, 123 Ia. 48, 98 N. W. R. 354; *People v. Schuyler*, 106 N. Y. 298; *People v. Murray*, 101 N. Y. 126.

57. *Hoyt v. Hoyt*, 112 N. Y. 493.

58. *People v. Murphy*, 101 N. Y. 126.

59. *Matter of Coleman*, 111 N. Y. 220.

60. *Feeney v. Long Id. Ry. Co.*, 116 N. Y. 375.

61. *People v. Koemer*, 154 N. Y. 355; *Bowles v. Kansas City*, 51 Mo. App. 416.

62. *Van Allen v. Gordon*, 83 Hun (N. Y.) 379.

to criminal cases as well as civil.⁶³ But where the testimony is offered for the purpose of showing either the innocence or guilt of the accused, a higher public policy demands that the testimony be admitted.⁶⁴

§ 21. **Privilege for patient's benefit. Waiver.**

—The privilege conferred by the statutes is for the patient's benefit. It is the policy of the law to protect patients in the free disclosure of their maladies to their physicians. The latter may not make disclosures unless authorized to do so by their patients. The patient, however, may waive his privilege. This he may do at any time.⁶⁵ It has been held that the patient's attorney may waive the privilege.⁶⁶ And after the patient's death it may be waived by his personal representative.⁶⁷ In a contest over the probate of the deceased patient's will, on the ground of testamentary incapacity, some courts hold that the physician may testify,⁶⁸ while other courts hold

63. *People v. Murphy, supra.*

64. *People v. Harris*, 136 N. Y. 423; *Hank v. State*, 143 Ind. 238; *People v. Lane*, 101 Cal. 513.

55. *Morris v. N. Y., etc., Ry. Co.*, 148 N. Y. 88, 51 Am. St. Rep. 675; *In re Bruendl*, 102 Wis. 45, 78 N. W. R. 16; *Cramer v. Hunt*, 154 Mo. 112, 77 Am. St. Rep. 752.

66. *Alberti v. N. Y., etc., Ry. Co.*, 118 N. Y. 77; *Thompson v. Ish*, 99 Mo. 160.

67. *Holcomb v. Harris*, 166 N. Y. 257; *Morris v. Morris*, 119 Ind. 341.

68. *Winters v. Winters*, 102 Ia. 53, 71 N. W. R. 184, 63 Am. St. Rep. 428; *In re Shapter*, 35 Colo. 578, 85 Pac. R. 688, 117 Am. St. Rep. 216, 6 L. R. A. N. S. 575; *In re Conner*, 124 N. Y. 663, 27 N. E. R. 413.

the contrary.⁶⁹ It has been held that the contestant may not waive the privilege;⁷⁰ but that the proponent may.⁷¹ In an action on an insurance policy on the patient's life it has been held that the beneficiary may waive the privilege.⁷² And in the case of infant patients it has been held that the privilege may be waived by their parents.⁷³ The mere fact that the patient takes the stand, or calls the physician as a witness, does not constitute a waiver of the privilege.⁷⁴ Where a physician is a subscribing witness to his patient's will he is competent to testify as to the issue of testamentary capacity.⁷⁵

In New York the rule of privilege is also applicable to communications between a patient and his professional or registered nurse.⁷⁶ It is

69. *Matter of Budan*, 156 Cal. 230, 104 Pac. R. 442; *Towles v. McCurdy*, 163 Ind. 12, 71 N. E. R. 129; *In re Van Alstine*, 26 Utah 193, 72 Pac. R. 942.

70. *In re Mansbach*, 150 Mich. 348, 114 N. W. R. 65; *Heaston v. Krieg*, 167 Ind. 101, 77 N. E. R. 805.

71. *Fraser v. Jennison*, 42 Mich. 206.

72. *Penn. Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769.

73. *State v. Depositer*, 21 Nev. 107, 25 Pac. R. 1000 (waiver may be implied).

74. *Butler v. Manhattan Ry. Co.*, 143 N. Y. 630; *McConnell v. Osage*, 80 Ia. 293.

75. *In re Mullin*, 110 Cal. 252, 42 Pac. R. 645.

76. *Homnyack v. Prudential Ins. Co.*, 195 N. Y. 456, 87 N. E. R. 769.

not applicable, however, to veterinary surgeons,⁷⁷ dentists,⁷⁸ or drug clerks.⁷⁹

§ 22. **Communications to spiritual advisers.**—

At common law, communications or confessions to a spiritual adviser are not privileged.⁸⁰ But by statute, in most of the states, such communications are privileged.⁸¹ The statutes provide substantially that no minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character in the course of discipline enjoined by the rules or practice of such denomination.⁸² The rule is applicable to the communications of both parties.⁸³ It is usually restricted, however, to communications that come within the course of discipline enjoined by the church.⁸⁴

77. *Hendershot v. Tel. Co.*, 106 Ia. 529, 76 N. W. R. 828, 68 Am. St. Rep. 313.

78. *People v. De France*, 104 Mich. 563, 62 N. W. R. 709.

79. *Brown v. Ry. Co.*, 66 Mo. 588, 597.

80. *Normanshaw v. Normanshaw*, 69 L. T. Rep. N. S. 468; *Wheeler v. Le Marchant*, 17 Ch. Div. 675, 45 J. P. 728, 50 L. J. Ch. 793, 44 L. T. Rep. N. S. 632.

81. *State v. Morgan*, 196 Mo. 177, 95 S. W. R. 402, 7 Ann. Cas. 107 and note; *Partridge v. Partridge*, 220 Mo. 321, 119 S. W. R. 415, 132 Am. St. Rep. 584; *Blossi v. Chicago, etc., Ry. Co.*, 144 Ia. 697, 123 N. W. R. 360, 26 L. R. A. N. S. 255; *Knight v. Lee*, 80 Ind. 201; *Hills v. State*, 61 Neb. 589, 85 N. W. R. 836, 57 L. R. A. 155.

82. *People v. Gates*, 13 Wend. 311.

83. *Gill v. Bouchard*, 5 Quebec Q. R. D. 138.

84. *State v. Morgan*, *supra*; *People v. Gates*, *supra*; *Hills v. State*, *supra*; *Gillooley v. State*, 58 Ind. 182; *Milburn v.*

The privilege is for the benefit of the penitent. Hence the spiritual adviser may not waive it. If the penitent does not waive it the privilege remains forever.⁸⁵

§ 23. Affairs of state. Political communications.—Based upon public policy, communications involving affairs of state have always been privileged. Mr. Stevens says, "No one can be compelled to give evidence relating to any affairs of state, or as to official communications between public officers upon public affairs, except with the permission of the officer at the head of the department concerned."⁸⁶

While a disclosure of affairs of state might endanger the nation,⁸⁷ and also cause injury to the servants of the state as individuals,⁸⁸ yet, inasmuch as the rule of privilege can be utilized for partisan and selfish ends it is fraught with great danger, and for this reason has been most severely criticised.

§ 24. Same. Rule criticised.—Mr. Botts says, "I can never express, in terms sufficiently strong, the detestation and abhorrence which every American should feel towards a system of state secrecy. It never can conduce to public utility, though it may furnish pretexts to men in power

Haworth, 47 Col. 593, 108 Pac. R. 155, 19 Ann. Cas. 643 and note.

85. *Westover v. Ætna Life Ins. Co.*, 99 N. Y. 56.

86. *Steph. on Evid.*, art. 112.

87. *Thompson v. German Valley Ry. Co.*, 22 N. J. E. 111.

88. *Hennessy v. Wright*, L. R. 21 Q. B. D. 509, 512.

to shelter themselves and their friends and agents from the just animadversion of the law, to direct their malignant plots to the destruction of other men while they are themselves secure from punishment.”⁸⁹ Dean Wigmore says, “The menace which this supposed privilege implies to individual liberty and private right will justify us in repudiating it before it is too solidly entrenched in precedent.”⁹⁰ And Edward Livingston, the great American jurist, says, “No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin and reduced to slavery, by suffering gradual impositions and abuses which were imperceptible only because the means of publicity had not been secured.”⁹¹

§ 25. **Application of rule.**—But in the face of severe criticism the rule still obtains. State secrets and information acquired by public officials are privileged whenever their disclosure would be contrary to public policy.⁹² The rule is applicable to communications pertaining to affairs of state and those pertaining to the administra-

89. Aaron Burr's Trial, Robertson's Rep. Vol. II., p. 517. See also, Justic Mondelet's severe criticism of the rule in *Gugy v. Maguire*, 13 Lower Canada 33, 38.

90. Wigmore on Evid., Vol. IV., p. 3342.

91. Works of Edward Livingston, Vol. I., p. 15.

92. *Stegal v. Thurman*, 175 Fed. R. 813; *In re Lamberton*, 124 Fed. R. 446; *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 736; *Roske v. Comingore*, 177 U. S. 459; *In re Weeks*, 82 Fed. R. 729; *Hartranft's Appeal*, 85 Pa. St. 433, 447.

tion of penal justice. Not only are the heads of departments of both the national and the state governments privileged, but also subordinate officers. The disclosure of communications between heads of the departments of state and their subordinate officers is not compellable. Thus, communications between a United States district attorney and the attorney-general;⁹³ or between the governor of a province and his attorney-general;⁹⁴ or between an agent of the government and the secretary of state,⁹⁵ are privileged. Communications between the president of the United States and heads of governmental departments are privileged. Similarly, those between the governor of a state and heads of governmental departments are privileged. It was held that a contract between the president of the United States and an individual, made during the civil war, whereby the latter agreed to render secret services in furnishing the president with information as to the movements and resources of the enemy was privileged.⁹⁶

The rule of privilege applies to proceedings of parliament,⁹⁷ and to proceedings of the United States senate in executive session.⁹⁸ The presi-

93. *United States v. Six Lots, 1 Woods* (U. S.) 234.

94. *Wyatt v. Gore*, Holt 299.

95. *Anderson v. Hamilton*, 2 Brod. & B. 156 n; *Marbury v. Madison*, 1 Crauch (U. S.) 144.

96. *Totten v. United States*, 92 U. S. 105.

97. *Beatson v. Skene*, 5 Hurl. & N. 838.

98. *Law v. Scott*, 5 Har. & J. (Md.) 438.

dent of the United States and the governors of the several states may refuse to produce documents when in their judgment it would be inexpedient to do so as a matter of public policy. Moreover, secondary evidence of their contents is not admissible.⁹⁹

As stated at the beginning of this section, the basis of the privilege is public policy. Where a disclosure would be against public policy the privilege obtains; but where a disclosure would not be against public policy it should not obtain.

§ 26. **Who determines the question.**—The question arises, who should determine the matter, the officer who has possession of the communication, or the court? Upon this question there are two views. One is that the officer having possession of the communication should decide it. The other is that the court should do so. The reason assigned for the former view is that since a judicial inquiry would necessarily have to be public this would of necessity give the communications the publicity which public policy requires should be avoided.¹⁰⁰ The two reasons that have been assigned in favor of the latter view are, (1) it is an inherent function of the court to decide upon the admissibility of testimony; and (2) a higher public policy obtains in favor of this view. Dean Wigmore says, "The truth cannot be escaped that a court which ab-

99. *Washington v. Scribner*, 109 Mass. 487.

100. *Beatson v. Skene*, *supra*.

icates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to designing officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it is to shield his wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the judge."¹

§ 27. **Matters pertaining to the administration of penal justice.**—In prosecutions for crime, the names of informers and the channels of communication are privileged. The basis of this rule is public policy. The rule is for the benefit of the government—not the informer. Courts will not compel or permit the disclosure of the names of informers, or the channels of communications, without the consent of the government.² The privilege also extends to the governor, secretary of state, adjutant general and a general and major of the national guard.³ The rule has frequently been applied in revenue cases.⁴ It also

1. Wigmore on Evid., Vol. IV., p. 3345.

2. Worthington v. Scribner, 109 Mass. 487, 489, 12 Am. Rep. 736; Gabriel v. McMullen, 127 Ia. 426, 103 N. W. R. 355; State v. Soper, 16 Me. 293, 33 Am. Dec. 665; Hardy's Trial, 24 How. St. Tr. 8.

3. Appeal of Hartrauf, 85 Pa. St. 433.

4. Worthington v. Scribner, *supra*.

has been applied in cases of larceny,⁵ libel,⁶ treason,⁷ counterfeiting,⁸ etc.

§ 28. **Scope of the privilege.**—As regards the matters which are privileged the rule covers a wide range. Any information possessed by a state department comes within the rule.⁹ In the case of subordinate officers who refuse to testify the court decides whether their claim of privilege is justified or not.¹⁰ But in the case of high public officials the court will not compel them to testify.¹¹

§ 29. **Social communications.**—Based upon public policy, communications between husband and wife, in the confidence of the marital relation, are privileged.¹² At the common law husband and wife were incompetent to testify either for or against the other.¹³ Enabling statutes, however, have modified this rule very much, so

5. *State v. Soper, supra.*

6. *Gray v. Pentland, Serg. & R. (Pa.) 23; Earl v. Vass, 1 Shaw 229.*

7. *R. v. Watson, 32 How. St. Tr. 1, 102, 105, 2 Stark, 116, 136; R. v. Hardy, 24 How. St. Tr. 199, 753, 816, 823.*

8. *United States v. Moses, 4 Wash. (U. S.) 726.*

9. *State v. Soper, supra; Attorney General v. Briant, 15 Mees. & W. 169, 183.*

10. *Beatson v. Skene, 5 Hurl. & N. 838, 854.*

11. *Thompson v. Ry. Co., 22 N. J. Eq. 111.*

12. *Com. v. Cronin, 185 Mass. 96, 69 N. E. R. 1065; Schrefler v. Chase, 245 Ill. 395, 92 N. E. R. 272, 137 Am. St. Rep. 330; Sexton v. Sexton, 129 Ia. 487; Leucht v. Leucht, 129 Ky. 700, 112 S. W. R. 845, 130 Am. St. Rep. 486; Warner v. Press Pub. Co., 132 N. Y. 181, 30 N. E. R. 393.*

13. *Southwick v. Southwick, 49 N. Y. 510.*

that the disqualification has practically disappeared.¹⁴ These statutes, however, have not changed the rule as regards confidential communications.¹⁵ There is much confusion in the decisions, however, owing to the fact that some courts fail to discriminate between the anti-marital privilege and the marital disqualification to testify.¹⁶ The former may be waived, but not the latter.

§ 30. **Scope of the privilege.**—The privilege is confined to *confidential* communications.¹⁷ As to information not acquired through the confidence of the marital relation the privilege does not apply.¹⁸ A few courts, however, apply the rule to all communications between the spouses.¹⁹ The former rule obtained at common law,²⁰ and is in harmony with the great weight

14. *People v. Langtree*, 64 Cal. 256, 30 Pac. R. 813; *Westerman v. Westerman*, 25 Ohio St. R. 500, 507.

15. *Hyde v. Gannett*, 175 Mass. 177, 55 N. E. R. 991; *People v. Wood*, 126 N. Y. 249, 27 N. E. R. 362; *Bassett v. United States*, 137 U. S. 496.

16. *Wigmore on Evid.*, Vol. IV., § 2334.

17. *Ward v. Oliver*, 129 Mich. 300, 88 N. W. R. 631; *Sexton v. Sexton*, *supra*.

18. *Brown v. Johnson*, 101 Wis. 661, 77 N. W. R. 900; *Clover v. M. W. A.*, 142 Ill. App. 276; *Shanklin v. McCracken*, 140 Mo. 348, 41 S. W. R. 898; *Safe v. State*, 127 Ind. 15, 26 N. E. R. 667; *Seitz v. Seitz*, 170 Pa. St. 71; *Parkhurst v. Berdell*, 110 N. Y. 386; *Hagerman v. Wigent*, 108 Mich. 192.

19. *Com. v. Hayes*, 145 Mass. 289; *Newstrom v. St. Paul, etc., Ry. Co.*, 61 Minn. 78.

20. *Aveson v. Kinnaird*, 6 East 194.

of authority. As said by Dean Wigmore, "The essence of the privilege is to protect confidences only."²¹

The rule applies to confessions of infidelity;²² accusations of infidelity and want of affection;²³ threats against third persons;²⁴ communications as to the spouse's income or property;²⁵ documents intrusted to the custody of the other spouse,²⁶ and letters written by one spouse to the other.²⁷ It has been held, however, that a letter by the wife to her husband giving reasons for leaving him is not privileged.²⁸ The same has been held as to a boastful and defiant declaration by the husband of his misconduct, and of his intention to continue it, accompanied by insolent and brutal taunts.²⁹ In an action for separation either spouse may testify to communica-

21. Wigmore on Evid., Vol. IV., § 2336.

22. *Sanborn v. Gale*, 162 Mass. 412, 38 N. E. R. 710, 26 L. R. A. 864; *Henderson v. Chaires*, 25 Fla. 26, 6 So. R. 164; *State v. Brittain*, 117 N. C. 783, 23 S. E. R. 433 (incest).

23. *Sutcliffe v. Iowa State Trav. Men's Assoc.*, 119 Ia. 220, 93 N. W. R. 90, 97 Am. St. Rep. 298.

24. *Gant v. State*, 55 Tex. Cr. R. 284, 116 S. W. R. 801.

25. *In re Jefferson*, 96 Fed. R. 826.

26. *Toole v. Toole*, 107 Ga. 472.

27. *State v. Ulrich*, 110 Mo. 350; *Derham v. Derham*, 125 Mich. 109.

28. *Fowler v. Fowler*, 33 N. Y. State Rep. 746; *Fuller v. Fuller*, 177 Mass. 184, 58 N. E. R. 588, 83 Am. St. Rep. 273.

29. *Seitz v. Seitz*, *supra*.

tions between them.³⁰ But neither may testify to facts which tend to show adultery of the other. Either spouse may testify as to the mental or physical condition of the other spouse.³¹ The wife may testify to her husband's intoxicated condition.³² And one spouse may testify to a communication from the other spouse which the latter heard from a third party.³³ Communications between a husband and his wife, in the presence of a third party, are not privileged.³⁴ Where the conversation of one spouse is a mere device to entrap the other spouse into a confession of infidelity the conversation is not privileged.³⁵ In a divorce proceeding, where each spouse charges the other with adultery, each may testify as regards the charge made by the other spouse, but not as regards the charge made by himself or herself.³⁶ In an action for criminal conversation the plaintiff is competent to testify to the fact in issue;³⁷ and in such case

30. *De Meli v. De Meli*, 120 N. Y. 485; *Morrill v. Palmer*, 68 Vt. 1.

31. *Stack v. Pourtsmouth*, 52 N. H. 221; *United States v. Guteau*, 1 Mackey (D. C.) 498, 47 Am. Rep. 247. *Contra*, *Brewer v. Ferguson*, 11 Humph. (Tenn.) 565.

32. *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. R. 261; *In re Van Alstine*, 26 Utah 193, 72 Pac. R. 942.

33. *Giddings v. Iowa Sav. Bank*, 104 Ia. 676, 74 N. W. R. 21.

34. *Lyon v. Prouty*, 154 Mass. 488.

35. *Fowler v. Fowler*, 11 N. Y. Suppl. 419, 19 N. Y. Civ. Proc. 282.

36. *McCarthy v. McCarthy*, 143 N. Y. 235.

37. *Smith v. O'Brien*, 24 N. Y. State Rep. 708.

a divorced spouse may testify.³⁸ Where the husband is charged with procuring a miscarriage³⁹ on his wife, or with any other crime⁴⁰ against her, the latter may testify against him. Where the wife sues her husband for separation upon the ground of cruel treatment or desertion either spouse may testify against the other spouse.⁴¹

Ordinarily, business communications between husband and wife are not confidential.⁴² It has been held, however, that, in an action by a widow against her deceased husband's heirs and devisees, written communications between the spouses during the husband's lifetime, pertaining to a business in which they were both interested, to the effect that the business was unprofitable, were privileged.⁴³

If a third party overhears a communication between the spouses it is no longer privileged.⁴⁴

38. *Dickerman v. Graves*, 6 Cush. (Mass.) 309; *Wottrich v. Freeman*, 71 N. Y. 601.

39. *State v. Dyer*, 59 Me. 303.

40. *Jordan v. State*, 142 Ind. 442; *Tucker v. State*, 71 Ala. 342; *Whipp v. State*, 34 Ohio St. 87; *United States v. Smallwood*, 5 Cranch (U. S.) 35.

41. *Casey v. Casey*, 4 Daly (N. Y.) 270.

42. *Schaffner v. Reuter*, 37 Barb. (N. Y.) 44; *Ward v. Olliver*, 129 Mich. 300, 88 N. W. R. 631; *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. R. 123, 6 Am. St. Rep. 384; *Wood v. Chetwood*, 27 N. J. E. 311; *Sexton v. Sexton*, *supra*; *Beitman v. Hopkins*, 109 Ind. 177, 9 N. E. R. 720.

43. *Mitchell v. Mitchell*, 80 Tex. 101.

44. *Com. v. Griffin*, 110 Mass. 181; *People v. Hayes*, 140 N. Y. 484, 5 N. Y. State Rep. 463, 37 Am. St. Rep. 572; *State*

But a stranger may not object to the disclosure of a privileged communication.⁴⁵ Some courts hold that, where a third party overhears a conversation between the spouses, or letters by one spouse to the other inadvertently get into the hands of a third party, the communications are still privileged.⁴⁶ The weight of authority, however, is to the contrary. According to the latter view even an eavesdropper may testify to the communications.⁴⁷ But where the third party is incapable of understanding the conversation,⁴⁸ or where it takes place in the presence of the youthful members of the family,⁴⁹ the conversation is still privileged.

Where one spouse acts as the agent of the other spouse the communications between them are usually not privileged.⁵⁰ Some courts, however, hold the contrary.⁵¹

v. Hoyt, 47 Conn. 518; State v. Center, 35 Vt. 386; State v. Ulrich, 110 Mo. 350.

45. McNutty's Appeal, 135 Pa. St. 210.

46. Mercer v. State, 40 Fla. 216, 74 Am. St. Rep. 135; Scott v. Com., 94 Ky. 511, 42 Am. St. Rep. 371.

47. Com. v. Griffin, *supra*; People v. Hayes, 140 N. Y. 484, 37 Am. St. Rep. 572.

48. Schierstein v. Schierstein, 68 Mo. App. 205.

49. Lyon v. Prouty, 154 Mass. 488 (in presence of daughter fourteen years old); Hopkins v. Grimshaw, 165 U. S. 342.

50. State v. Burlingame, 146 Mo. 207; Schmied v. Frank, 86 Ind. 250; Lurty v. Lurty, 107 Va. 466, 59 S. E. R. 405; Nichols v. Rosenfeld, 181 Mass. 525, 63 N. E. R. 1063 (reversing Com. v. Hayes, 145 Mass. 289, 14 N. E. R. 151); Stickney v. Stickney, 131 U. S. 227, 9 S. Ct. 677, L. ed. 136.

§ 31. **Right to waive the privilege.**—In some jurisdictions the party who makes the communications may waive the privilege.⁵² In other jurisdictions both spouses must concur.⁵³ The mere fact that one spouse takes the stand and testifies generally is not a waiver of the privilege.⁵⁴ Nor does the death of one spouse, or a divorce, constitute a waiver.⁵⁵ But if one spouse testifies to the communication,⁵⁶ or calls the other spouse to the stand to do so, the privilege is waived.⁵⁷

§ 32. **Judicial communications.**—The deliberations of judges, and other matters which occur in the consulting room, are privileged.⁵⁸ Moreover, as said by Mr. Stephen, "It is doubtful whether a judge is compellable to testify as to anything which came to his knowledge in court as such judge."⁵⁹

51. *Marshall v. Marshall*, 71 Kan. 313, 80 Pac. R. 629; *Kelley v. Andrews*, 102 Ia. 119, 71 N. W. R. 251.

52. *Hutchison v. State*, 67 Ind. 449; *Stickney v. Stickney*, 131 U. S. 227.

53. *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276; *People v. Wood*, 126 N. Y. 249.

54. *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223.

55. *State v. Kodat*, 158 Mo. 125; *Geer v. Goudy*, 174 Ill. 514; *Brock v. Brock*, 116 Pa. St. 109; *Hitchcock v. Moore*, 70 Mich. 112; *Hopkins v. Grimshaw*, 165 U. S. 342.

56. *State v. Turner*, 36 S. C. 534, 15 S. E. R. 602.

57. *Columbia, etc., Ry. Co. v. Hawthorne*, 3 Wash. Ter. 353.

58. *Noland v. People*, 33 Colo. 322, 80 Pac. R. 887. See also, *Whart. Evid.* (3d ed.), § 600.

59. *Steph. Evid.*, art. 111. See also, *R. v. Gazard*, 8 Car. & P. 595.

For discussions pertaining to the deliberations of grand and petit jurors see §§ 49 and 50 of Chapter I. on Competency of Witnesses.

CHAPTER III.

Examination of Witnesses.

§ 1. **In general.**—Each party to a suit has the right to call witnesses to the stand in his behalf. The conduct of the examination, however, is under the direction and control of the court and is susceptible of only a few positive rules.¹ Thus, the court may confine the examination of a witness to one of two or more of the attorneys on one side of a case;² or allow more than one of them to examine him.³ It may prevent useless delays in the examination,⁴ and the eliciting of incompetent testimony.⁵ The object of the examination is to elicit the truth from the witness; but, as said by Dr. Greenleaf, "The character, intelligence, moral courage, bias, memory and

1. *Mathis v. State*, 45 Fla. 46, 34 So. R. 287; *Burdside v. Everett*, 186 Mass. 4, 71 N. E. R. 82; *Beyer v. Hermann*, 173 Mo. 295, 73 S. W. R. 164.
2. *State v. Nugent*, 116 La. 99, 40 So. R. 581. See also, *Johnson v. Shaw*, 204 Mass. 165, 90 N. E. R. 518.
3. *Citizens Bank v. Fromholz*, 64 Neb. 284, 89 N. W. R. 775.
4. *State v. Bean*, 74 Vt. 111, 52 Atl. R. 269; *State v. Caron*, 118 La. 349, 42 So. R. 960.
5. *Kenyon v. Woodruff*, 33 Mich. 310.

other circumstances of witnesses are so various as to require almost equal variety in the manner of interrogation and the degree of its intensity to attain that end.”⁷

Ordinarily, witnesses are examined by counsel. A party to the suit, however, may act as his own counsel and examine witnesses. Moreover, in the absence of a rule of court to the contrary, he may do so even where he has counsel employed in the case.⁸

§ 2. Order of conducting the examination.—As a general rule, the examination of a witness comprises three stages—(1) the direct examination; (2) the cross-examination, and (3) the re-examination. In some cases it comprises a fourth stage—the re-cross examination. These various stages are discussed in detail in later sections of this chapter.

§ 3. Testimony given *viva voce*.—As previously stated, the object of the examination is to elicit the truth. And, in a large measure, the truthfulness of a witness is judged by his demeanor on the stand. One of the chief reasons for excluding hearsay testimony is the fact that the jury are not afforded an opportunity to observe the demeanor of the witness. Hence the importance of the rule that he must be person-

6. *State v. Farley*, 87 Ia. 22, 53 N. W. R. 1089.

7. *Greenl. Evid.*, § 431.

8. *Talbot v. Talbot*, 2 J. J. Marsh, (Ky.) 3. See also, *In re Singleton*, 8 Dana (Ky.) 315.

ally present whenever possible and state orally the facts which he is called upon to give.⁹

§ 4. Testimony must be under oath or affirmation.—The examination of a witness must be under oath or affirmation.¹⁰ This requirement is to insure the utterance of the truth by laying hold of the conscience of the witness and appealing to his sense of accountability.¹¹ In other words, as stated by Somerville, J., “To purge the conscience, and impress the witness with a due sense of religious obligation, so as to secure the purity and truth of his testimony under the influence of its sancity.”¹²

Testimony by the prosecuting attorney,¹³ or by a petit juror,¹⁴ must be given under oath or affirmation the same as that given by any other witness. It is not essential, however, that a witness be sworn more than once during the trial.¹⁵

§ 5. Effect of testifying without being sworn.—Where a witness testifies without being sworn, and the mistake is discovered before the jury

9. Noonan v. Orton, 5 Wis. 60, 61; Maxwell's Executors v. Wilkinson, 113 U. S. 656, 5 Sup. Ct. 691; Alcock v. Loyal Exch. Assur. Co., 13 Adol. & El. (N. S.) 292.

10. State v. Smith, 78 N. C. 462; Walker v. Noll, 92 Ark. 148, 122 S. W. R. 488; State v. Tom, 8 Oreg. 177.

11. Clinton v. State, 33 Ohio St. 33.

12. Blackstone v. State, 71 Ala. 319.

13. State v. Lowry, 42 W. Va. 205, 24 S. E. R. 561.

14. Underhill v. Waite, 9 Daly (N. Y.) 83; Anderson v. Barnes, 1 N. J. L. 203.

15. Redd v. State, 65 Ark. 475, 47 S. W. R. 119; Bullock v. Koon, 9 Cow. (N. Y.) 30.

retires, it may be corrected either by recalling the witness and having him testify under oath, or by the court charging the jury to disregard his testimony.¹⁶ Moreover, where the mistake is discovered before the jury retires, and no objection is made to it, the omission is waived.¹⁷ As said by Shaw, C. J., "But a verdict having been taken, with knowledge of the omission of the witness to be sworn, through inadvertence of all the parties, the objection comes too late, and cannot effect the validity of the verdict."¹⁸ It has been held, however, that where a witness testifies without being sworn, and the mistake is not discovered until after the verdict, the omission is fatal.¹⁹ The fact that a witness is not sworn until after his examination begins does not affect the admissibility of the testimony he gives after taking the oath.²⁰

§ 6. Modes of binding the conscience.—The object sought in requiring a witness to swear or affirm is to bind his conscience. To accomplish this no set form should be demanded. At common law any mode, which he believes binding

16. *State v. Williams*, 49 W. Va. 220, 38 S. E. R. 495; *Southern Ry. Co. v. Ellis*, 123 Ga. 614, 51 S. E. R. 594.

17. *Slaughter v. Whitlock*, 12 Ind. 338.

18. *Cady v. Norton*, 31 Mass. 236.

19. *Hawkes v. Baker*, 6 Me. 72; *Reg. v. James*, 6 Cox C. C. 5. But see, *Moore v. State*, 96 Tenn. 209, 33 S. W. R. 1046; *Goldsmith v. State*, 32 Tex. Cr. R. 112, 22 S. W. R. 405.

20. *Com. v. Keck*, 148 Pa. St. 639, 24 Atl. R. 161.

on his conscience, is sufficient.²¹ "The pure principle of the common law is that oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences."²² "It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking."²³ And as said by Mansfield, L. C. J., "Upon the principles of the common law there is no particular form essential to an oath to be taken by a witness; but as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most."²⁴ Where it does not appear that some other form of oath is more binding on the conscience of the witness it is not reversible error to administer the oath in the usual form.²⁵ Where a contention is made that the usual oath is not binding on the conscience of the witness the question should be decided before the oath is administered.²⁶ A witness who takes the usual oath is presumed to intend that his conscience is thereby bound.²⁷ Where the

21. *McKinney v. People*, 7 Ill. 540, 43 Am. Dec. 65; *Gonzalez v. State*, 31 Tex. 495. See also, *Bow v. People*, 160 Ill. 438, 43 N. W. R. 593.

22. *Gill v. Caldwell*, 1 Ill. 53.

23. *Ornichund v. Barker*, 1 Atk. 45 (per Lord Chancellor Hardwicke).

24. *Atcheson v. Everitt*, Cowp. 389.

25. *People v. Green*, 99 Cal. 564, 34 Pac. R. 231.

26. *State v. Davis*, 186 Mo. 533, 85 S. W. R. 354.

27. *Pullen v. Pullen*, (N. J. Ch. 1886) 4 Atl. R. 82.

defendant is indicted under several aliases, the clerk, in administering the oath to the witnesses, may, after giving the defendant's true name, designate him by his several aliases.²⁸

§ 7. **Usual form of the oath.**—At the English common law, the usual form of the oath, in a criminal case, is as follows: "The evidence you shall give between our sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth. So help you God." In a civil case it is as follows: "The evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth. So help you God." While the clerk is repeating the oath, the witness holds in his hand a copy of the Bible; and after the clerk has repeated the oath the witness kisses the Bible.²⁹

In this country the mode of swearing witnesses is usually prescribed by statute.³⁰ The General Statutes of Kansas provide as follows: "All oaths shall be administered by laying the right hand upon the Holy Bible, or by the uplifted right hand."³¹ "Any person having conscientious scruples against taking an oath may affirm with like effect."³² "All oaths shall com-

28. *People v. Everhardt*, 104 N. Y. 591, 11 N. E. R. 62, 6 N. Y. Cr. R. 231.

29. *Chitty's Criminal Law* (4th Amer. ed.), Vol. I. p. 616.

30. *Curtis v. Lehmann*, 115 La. 40, 38 So. R. 887; *People v. Swist*, 136 Cal. 520, 69 Pac. R. 223.

31. § 6745.

32. § 6746.

mence and conclude as follows: "You do solemnly swear," etc. "So help you God." Affirmation shall commence and conclude as follows: "You do solemnly, sincerely and truly declare and affirm," etc.; "And this you do under the pains and penalties of perjury."³³ It has been held that the omission of the invocation "So help you God" is not fatal.³⁴

§ 8. **Same. Mode of administering the oath.**—In England and Canada the witness takes the oath by kissing the Bible. This custom, however, has been severely criticised. It has been characterized as repulsive and unsanitary,³⁵ and also as a relic of idolatry.³⁶ In this country the oath is usually administered to the witness while he is standing with uplifted right hand.³⁷ A witness who has conscientious scruples against taking an oath is usually allowed to affirm. It has been held, however, that a witness who has no conscientious scruples against taking an oath should not be allowed to affirm.³⁸ All the witnesses may be sworn in a body at the beginning of the trial. This is a matter, however, which rests in the discretion of the court.³⁹

33. § 6747.

34. *People v. Swist, supra.*

35. *Wigmore on Evid.*, Vol. III. p. 2353, note.

36. 31 Cent. Law Journal 93.

37. *Gill v. Caldwell, supra.*

38. *Williamson v. Carroll*, 16 N. J. L. 217; *King v. Fearson*, 14 Fed. Cas. No. 7790, 3 Cranch C. C. 435.

39. *State v. Rooke*, 10 Idaho 388, 79 Pac. R. 82; *Vickery v.*

§ 9. Interpreters.—Deaf and dumb witnesses.

—Where an interpreter is needed he may, after taking the oath himself, administer it to the witness.⁴⁰ The mode of examining a deaf and dumb witness is largely in the discretion of the court.⁴¹ His answers may be given in writing, or by signs thru the medium of an interpreter.⁴² The fact that he can read and write is no bar to communicating his answers by signs thru an interpreter.⁴³ And the fact that a witness testifies in a foreign tongue is not reversible error unless it appears that his testimony is incorrectly interpreted.⁴⁴ As regards the accuracy of the interpreter, this is not a question of law for the court of review to decide.⁴⁵ Where a witness is unable to speak above a whisper the court may appoint a person to repeat his answers.⁴⁶ The question of appointing an interpreter is usually in the discretion of the court.⁴⁷ But where the

State, 50 Fla. 144, 38 So. R. 907; *Ripsey v. State*, 29 Tex. App. 37, 14 S. W. R. 448.

40. *Com. v. Jongrass*, 181 Pa. St. 172, 37 Atl. R. 207.

41. *Skaggs v. State*, 108 Ind. 53, 8 N. E. R. 695 (witness shocked at question was allowed to give her answer in private); *Gregory v. Chicago, etc., Ry. Co.*, 147 Pa. 715, 124 N. W. R. 797.

42. *State v. Howard*, 118 Mo. 127, 24 S. W. R. 41.

43. *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *Dobbins v. Little Rock Ry., etc., Co.*, 79 Ark. 85, 95 S. W. R. 794, 9 Ann. Cas. 84 and note.

44. *Com. v. Greason*, 204 Pa. St. 64, 53 Atl. R. 539.

45. *Skaggs v. State*, *supra*.

46. *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184.

47. *People v. Morine*, 138 Cal. 626, 72 Pac. R. 166.

court's refusal to do so deprives a party of a material witness it constitutes reversible error.⁴⁸ In the absence of an interpreter a witness should be required to testify in the English language.⁴⁹ A person who cannot read or write English may be qualified to act as an interpreter. If he can speak English, and also the language of the witness, he is qualified.⁵⁰

§ 10. **Atheists as witnesses.**—At common law an atheist is an incompetent witness. By statute, however, he is generally made competent. Where an atheist takes the oath he is estopped from denying its validity, and may be convicted of perjury if he testifies falsely. But in jurisdictions where an oath is essential other persons may object to his incompetency.⁵²

§ 11. **Variant views as to the purpose of the oath.**—The early view and the modern view as to the purpose of the oath are quite different. According to the early view its purpose was to exclude persons who lacked theological belief, or who had conscientious scruples against taking an oath, from testifying. This misconceived view resulted in much injustice. The true pur-

48. Chicago, etc., Ry. Co. v. Shenk, 131 Ill. 283, 23 N. E. R. 436.

49. Koehler v. Koehler, 104 Wis. 260, 80 N. W. R. 449.

50. Central of Georgia Ry. Co. v. Joseph, 125 Ala. 313, 28 So. 35.

51. Attorney General v. Bradlaugh, 14 2 B. D. 667, 671, 680, 681.

52. Attorney General v. Bradlaugh, *supra*.

pose of the oath, as understood today, and very generally applied, is to increase testimonial efficiency of witnesses by quickening their consciences and thereby stimulating them to tell the truth. The injustice of the early rule has largely disappeared, both in England and in this country. As said by Dean Wigmore, "Arguments are no longer needed to prove the impropriety of the old inexorable rule."⁵³

§ 12. **Testimonial capacity of children.**—At the English common law, capacity to take an oath and capacity to testify were practically equivalent terms. According to the modern view, however, as stated in the section next preceding, they are not equivalent terms. Where a person has sufficient intelligence and a moral sense to tell the truth he has capacity to testify. As regards infants there is no fixed age which constitutes the dividing line between competency and incompetency. It is a matter of intelligence rather than a matter of age.⁵⁴

An infant who has reached the age of fourteen years is presumed to have sufficient intelligence to comprehend the nature of an oath, and the danger and impiety of testifying falsely.⁵⁵ Where the infant is less than fourteen years of age he

53. Wigmore on Evid., Vol. III, § 1827.

54. Featherstone v. People, 194 Ill. 325, 62 N. E. R. 684.

55. State v. King, 117 Ia. 484, 91 N. W. R. 768; Shannon v. Swanson, 208 Ill. 52, 69 N. E. R. 869; State v. Doyle, 107 Mo. 36; State v. Richie, 28 La. Ann. 327, 26 Am. Rep. 100.

is not presumed to be competent.⁵⁶ The question is one which rests in the sound discretion of the court.⁵⁷ Children five years of age have been held competent.⁵⁸

The court may examine the child as to his competency to testify,⁵⁹ or permit the attorney to do so.⁶⁰ Refusal to do either has been held prejudicial error.⁶¹ Where the child manifests an understanding of right and wrong, and of the penalty attached to false swearing, he is considered competent.⁶² A statement by him that he will go to hell if he testifies falsely is usually treated as sufficient assurance of his capacity to

56. Cases in foot-note 55. See also, notes, 16 Am. St. Rep. 31; 19 L. R. A. 605-610.

57. *Clark v. Finnegan*, 127 Ia. 644 (child seven years of age held competent); *Donnelley v. Terr.*, 5 Ariz. 291, 52 Pac. R. 368 (child nearly seven held incompetent); *Com. v. Wilson*, 186 Pa. St. 1, 40 Atl. R. 283 (child of thirteen held competent).

58. *Wheeler v. United States*, 159 U. S. 523 (child five years of age held competent); *State v. Juneau*, 88 Wis. 180, 59 N. W. R. 580, 43 Am. St. Rep. 877, 24 L. R. A. 857 (girl five years of age held competent; indecent assault on herself); *Washburn v. People*, 10 Mich. 372 (child seven years of age held competent).

59. *State v. Juneau*, *supra*; *State v. Doyle*, 107 Mo. 36; *McGuire v. People*, 44 Mich. 286, 6 N. W. R. 662, 38 Am. Rep. 265.

60. *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4 and note.

61. *Young v. State*, 122 Ga. 725, 50 S. E. R. 996.

62. *Com. v. Lynes*, 142 Mass. 577, 56 Am. Rep. 709; *Lee v. Ry. Co.*, 67 Kan. 402, 73 Pac. R. 110; *McGuire v. People*, *supra*; *Carter v. State*, *supra*.

testify.⁶³ In the discretion of the court a child may be instructed as to the nature of the oath during a recess of the court.⁶⁴

§ 13. **Same. The theological test.**—At the English common law, competency to take an oath was essential. "An infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears on strict examination by the court to possess a sufficient knowledge of the nature and consequences of an oath . . . but if they are found incompetent to take an oath their testimony cannot be received."⁶⁵ In some jurisdictions, however, by statute, a child of tender years may testify without taking an oath. Such a statute obtains in Michigan.⁶⁶ This view is a sensible one. As said by Dean Wigmore, "A child's inclinations to tell the truth or the opposite is apt to be more a matter of instinct and of previous training and surroundings than of a conscien-

63. *Williams v. State*, 109 Ala. 64, 19 So. R. 530; *Draper v. Draper*, 68 Ill. 17.

64. *Com. v. Lynes*, 142 Mass. 577, 8 N. E. R. 408; *State v. Todd*, 110 Ia. 631, 82 N. W. R. 322.

65. *Rex v. Brasier*, East Pl. of the Crown, I, 443; *Hodd v. Tacoma*, 45 Wash. 436, 88 Pac. R. 842; *Neustadt v. N. Y. City Ry. Co.*, 104 N. Y. Suppl. 735.

66. *People v. Walker*, 113 Mich. 367, 71 N. W. R. 641; *People v. Beech*, 129 Mich. 622, 89 N. W. R. 363 (child six years old was asked six times whether she would promise to tell the truth and she nodded each time and it was held sufficient).

tious reflection upon the prospects of a future state."⁶⁷

§ 14. Capacity of an insane person to take an oath.—An insane person is not necessarily an incompetent witness. It has been held, however, that a monomaniac should not be allowed to testify.⁶⁸ By the great weight of authority, however, a monomaniac who understands the nature and obligations of an oath, and is capable of giving correct answers to questions submitted to him concerning what he has seen and heard, is a competent witness.⁶⁹

§ 15. Modification of common-law rule pertaining to theological belief.—The rigid and unjust requirement of the English common-law rule regarding theological belief has been modified by constitutional or statutory provisions. By these provisions a witness who has conscientious scruples against taking an oath may affirm.

§ 16. Compelling attendance of witnesses.—Courts have an inherent power to compel the attendance of witnesses before them.⁷⁰ This inherent power has been recognized and enforced from early times.⁷¹ By statute it has been extended to arbitrators, referees, etc., and also to

67. Wigmore on Evid., Vol. III, § 1821.

68. Waring v. Waring, 12 Jur. 947.

69. Coleman v. Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711; Holcomb v. Holcomb, 28 Conn. 177; District of Columbia v. Armes, 107 U. S. 579.

70. Jackson v. Mobley, 157 Ala. 408, 47 So. R. 590.

71. Army v. Long, 9 East 484.

municipal corporations. Congress,⁷² and also state legislatures,⁷³ have this power. The process by which witnesses are compelled to attend court as witnesses is the writ of subpoena.⁷⁴ In some jurisdictions statutes confer upon justices of the peace authority to compel witnesses to attend trials in a court of record of the county.⁷⁵ Subpoenas are valid within the territorial limits of the state. But by statute, distances are prescribed beyond which witnesses may not be compelled to travel. These statutes apply both to justice courts and courts of record. And fees are not recoverable for travel beyond the prescribed distances.⁷⁶ Some courts, however, have held the contrary.⁷⁷ In the federal courts the distance is limited to one hundred miles.⁷⁸

§ 17. Same. Right of an accused person to compulsory process.—At the English common law compulsory attendance of witnesses was not demandable of right even in criminal cases.⁷⁹ But by provisions in constitutions and statutes the rule is otherwise. Under these provisions

72. *Kilbourn v. Thompson*, 103 U. S. 168.

73. *Osborne*, Petitioner, 141 Mass. 307, 4 N. E. R. 618; *Rhinehart v. State*, 121 Tenn. 420, 117 S. W. R. 508, 17 Ann. Cas. 254.

74. *Kirkendall v. Luzerne Co.*, 11 Phila. (Pa.) 575.

75. *McHoney v. Kerwin*, 56 Mo. App. 459.

76. *Kingfield v. Pullen*, 54 Me. 398.

77. *Dutcher v. Justice*, 38 Ga. 214.

78. Rev. Stat. U. S., § 876 (U. S. Compl. St. 1901, page 667).

79. *Pittman v. State*, 51 Fla. 94, 41 So. R. 385; *United States v. Reid*, 12 How. (U. S.) 361, 13 L. ed. 1023.

persons accused of crime are entitled to compulsory process.⁸⁰ The right obtains not only in capital cases,⁸¹ but also in other cases of felony.⁸² In exercising the right application must be made in due time.⁸³ The officer intrusted with the duty of serving the process must exercise at least ordinary diligence.⁸⁴ Where the witness desired is a convict in the state penitentiary his deposition will suffice.⁸⁵ The court may compel, however, his personal attendance.⁸⁶ The same rule obtains where the witness is an inmate of the state hospital for the criminal insane.⁸⁷

The court may also require the production of documents.⁸⁸ It is essential, however, that the documents be described with sufficient certainty.⁸⁹ If they are privileged communications; or tend to subject the witness to a penalty or

80. *Rush v. State*, 167 Ala. 77, 53 So. R. 266; *State v. Gideon*, 119 Mo. 94, 24 S. W. R. 748, 41 Am. St. Rep. 634; *Pittman v. State*, *supra*; *Smith v. State*, 118 Ga. 61, 44 S. E. R. 817; *State v. Richard*, 127 La. 413, 53 So. R. 669.

81. *Enstace v. Greenville County*, 42 S. C. 190, 20 S. E. R. 88.

82. *Whittle v. Saluda County*, 59 S. C. 554, 38 S. E. R. 168. But see, *State v. Smith*, 2 Bay (S. S.) 62.

83. *Palmer v. State*, 165 Ala. 129, 51 So. R. 358.

84. *Smith v. State*, *supra*.

85. *People v. Putman*, 129 Cal. 258, 61 Pac. R. 961.

86. *People v. Putnam*, *supra*; *Hancock v. Parker*, 100 Ky. 143, 37 S. W. R. 594, 18 Ky. L. Rep. 622.

87. *In re Thaw*, 166 Fed. R. 71, 91 C. C. A. 657.

88. *United States Exp. Co. v. Henderson*, 69 Ia. 40.

89. *State v. Davis*, 117 Mo. 614.

criminal prosecution, the court must exclude them.⁹⁰

§ 18. **Same. Real party in interest.**—At the common law a real party in interest, was an incompetent witness; and, of course, the adverse party could not compel him to testify.⁹¹ Thus, a stockholder in a bank, in an action by the bank, could not be compelled to testify on behalf of the defendant.⁹² By statute, however, in some jurisdictions, a party to the suit, or a real party in interest, can be compelled to testify on behalf of the adverse party.⁹³ And a party may subpoena a co-party whose interest is adverse.⁹⁴

§ 19. **Same. Female witnesses.**—In a few states, including Alabama and Georgia, female witnesses are ordinarily allowed to give their testimony by deposition.⁹⁵ Whenever necessary, however, the court may require their personal attendance.⁹⁶

90. *Durkee v. Leland*, 4 Vt. 612; *United States v. Regburn*, 6 Pet. (U. S.) 352.

91. *Flint v. Allyn*, 12 Vt. 615; *Taylor v. Henderson*, 17 Serg. & R. (Pa.) 154; *State v. Charity*, 13 N. C. 543.

92. *Oldtown Bank v. Houlton*, 21 Me. 501.

93. *Lennartz v. Popp*, 118 Ill. App. 31; *Tucker v. Willis*, 34 Tex. 247; *In re Abbott*, 7 Okla. 78, 54 Pac. R. 319; *Ex Parte Priest*, 76 Mo. 229; *Wiley v. McBride*, 74 Ark. 34, 85 S. W. R. 84.

94. *Owings v. Jones*, 151 Ind. 30, 51 N. E. R. 82; *Dudley v. Steele*, 71 Ala. 423.

95. *Ex Parte Jenks*, 101 Ala. 429, 13 So. R. 564; *Augusta*, etc. Ry. Co. v. *Randall*, 85 Ga. 297, 11 S. E. R. 706.

96. Cases cited in foot-note 16.

§ 20. Witnesses privileged from arrest, etc.—

During the time witnesses are in attendance at court they are privileged from arrest and also from service of process on behalf of third parties. This rule obtains not only where they are present in response to subpoenas, but also where their attendance is voluntary.⁹⁷ The privileges stated also extend to all other proceedings of a judicial nature.⁹⁸ In the case of witnesses who attend from other states this rule of privilege is applied with even greater force.⁹⁹ The protection continues until the witnesses have had sufficient time to return home. It is also applicable to the parties to the suit. Moreover, it has been held applicable to attorneys from another state.¹⁰⁰ Ordinarily, it is somewhat strictly construed.¹ It may be waived by delay,² deviation,³ giving bail,⁴ confessing judgment⁵ or pleading in bar.⁶

Where a witness is arrested in violation of the

97. Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; Dungan v. Miller, 37 N. J. L. 182.

98. First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. R. 308; Mathews v. Tufts, 87 N. Y. 568.

99. *In re Healey*, 53 Vt. 694, 38 Am. Rep. 713; Thompson's Case, *supra*; Mathews v. Tufts, *supra*.

100. Central Trust Co. v. Mil. St. Ry. Co., 74 Fed. R. 442.

1. Chaffee v. Jones, 19 Pick. (Mass.) 260.

2. Clark v. Grant, 2 Wend. (N. Y.) 257 (delay of two days).

3. Chaffee v. Jones, *supra*.

4. Steward v. Howard, 15 Barb. (N. Y.) 26.

5. Gyer v. Irwin, 4 Dill. (Pa.) 107.

6. Randall v. Crandall, 6 Hill (N. Y.) 342. *Contra*, Washburn v. Phelps, 24 Vt. 506.

privilege the perpetrator is liable for contempt of court. And the party arrested will be discharged upon showing the want of jurisdiction of the court.⁷

§ 21. **Witnesses compelled to testify.**—Ordinarily, witnesses are bound to answer questions submitted to them, and refusal to do so subjects them to punishment for contempt.⁸ This rule does not apply, however, where the court is without jurisdiction.⁹ It has been held, however, that the jurisdiction of the court is a matter that may not be raised by a witness in this collateral way.¹⁰ Where the questions call for answers which tend to incriminate the witness, or which constitute privileged communications, he will not be required to answer them. Nor will he be required to answer questions which are immaterial or irrelevant. But the materiality and relevancy of answers are matters for the court to decide.¹¹

The power to punish for contempt is inherent and necessary and existed at common law.¹²

7. *Moleter v. Sinner*, 76 Wis. 308, 44 N. W. R. 1099, 20 Am. Rep. 35; *Christian v. Williams*, 111 Mo. 429, 20 S. W. R. 96.

8. *Holman v. Austin*, 34 Tex. 668. See also, note 13 L. R.

9. *Ellison v. State*, 125 Ind. 492, 24 N. E. R. 739; *Holman v. Austin*, *supra*; *Piper v. Pierson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438.

10. *In re Abeles*, 12 Kan. 451.

11. *Brady v. Veazie*, 47 Me. 85; *Ex parte Mc Kee*, 18 Mo. 599.

12. *United States v. Hudson*, 7 Cranch (U. S.) 32.

§ 22. **Same. Executive, judicial and legislative officers.**—As a general rule, neither executive, judicial or legislative officers are exempt from serving as witnesses when really needed to act in that capacity. This rule has been held to apply to the president of the United States,¹³ to judges of county courts,¹⁴ to members of congress when not attending a session, or going to or returning from congress,¹⁵ and to members of the president's cabinet.¹⁶

When a person serves as a witness before congress he is exempt from arrest, but not from the service of a subpoena or summons.¹⁷

§ 23. **Same. Ambassadors and consuls.**—Ambassadors and consuls, who are exempt from process of the courts, may not, of course, be compelled to testify.¹⁸

§ 24. **Obligations of a witness.**—A witness who is subpoenaed is bound to attend court. If he refuses he may be compelled to do so by attachment for contempt.¹⁹ Serious illness of him-

13. *United States v. Burr*, 25 Fed. Cas. No. 14, 692d.

14. *United States v. Caldwell*, 25 Fed. Cas. No. 14, 708, 2 Dall. (Pa.), 333, 1 L. ed. 404.

15. *United States v. Cooper*, 25 Fed. Cas. No. 14, 861, 4 Dal. (Pa.) 341, 1 L. ed. 859.

16. *United States v. Smith*, 27 Fed. Cas. No. 16, 342, 3 Wheel. Cr. 100.

17. *Wilder v. Welsh*, 1 MacArthur (D. C.) 566.

18. *United States v. Trumbull*, 48 Fed. R. 94.

19. *Wilson v. State*, 57 Ind. 71; *Stephens v. People*, 19 N. Y. 549.

self,²⁰ or of a member of his family,²¹ constitutes a sufficient excuse. But great personal inconvenience,²² or mere poverty,²³ is insufficient. A third party who causes a witness to be absent from court is liable for contempt.²⁴

Where a witness is served with a *subpoena duces tecum* he is bound to attend court and bring with him the documents described.²⁵ Refusal to do so renders him liable for contempt.²⁶ The relevancy and materiality of the testimony which he is called upon to give are questions for the court to decide and not the witness. Moreover, where the witness claims that the documents which he is called upon to produce are confidential communications,²⁸ or of such a nature as to subject him to a criminal prosecution,²⁹ the question is one for the court to decide.

§ 25. Statutory regulations.—The legislature may make reasonable regulations pertaining to the attendance of witnesses on behalf of a per-

20. *State v. Hatfield*, 72 Mo. 578.

21. *Foster v. McDonald*, 12 Heisk (Tenn.) 619.

22. *Pipher v. Lodge*, 16 Serg. & R. (Pa.) 214.

23. *People v. Davis*, 15 Wend. (N. Y.) 603.

24. *Montgomery v. Palmer*, 100 Mich. 436; *Savin's Case*, 131 U. S. 267.

25. *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Murray v. Elston*, 23 N. J. Eq. 212.

26. *United States Exp. Co. v. Henderson*, 69 Ia. 40.

27. *Bradley v. Veazie*, 47 Me. 85; *United States v. Term. Ry. Assoc.*, 148 Fed. R. 486.

28. *Durkee v. Leland*, 4 Vt. 612.

29. *United States v. Reyburn*, 6 Pet. (U. S.) 352.

son accused of crime.³⁰ Thus, it may limit the number of witnesses who shall be summoned on behalf of the accused, where the expense is to be borne by the county or state.³¹ But witnesses which he shows are material must be summoned.³² It has been held that a rule of court limiting the number of witnesses that may be called on behalf of a person accused of crime is void.³³ It also has been held that the right of an accused person to subpoena witnesses at the expense of the state is limited to capital cases.³⁴ Where the accused is able to bear the expense of procuring the witnesses he must do so.³⁵ In many jurisdictions statutes provide that the fees must be paid or tendered in advance to compel the attendance of witnesses.³⁶ It is otherwise, however, where witnesses are summoned on behalf of the state in a criminal case.³⁷ Moreover, in some jurisdictions this rule is applicable to witnesses sum-

30. *Moore v. State*, 59 Fla. 23, 52 So. R. 971.

31. *State v. Freddy*, 117 La., 121, 41 So. R. 436, 116 Am. St. Rep. 195; *State v. O'Brien*, 18 Mont. 1, 43 Pac. R. 1091; 44 Pac. R. 399.

32. *State v. Freddy*, *supra*.

33. *State v. Gideon*, 119 Mo. 94, 24 S. W. R. 748, 41 Am. St. Rep. 634. See also, 58 Ark. 544, 25 S. W. R. 840.

34. *State v. Archer*, 54 N. H. 465; *Com. v. Williams*, 13 Mass. 501. But see *Enstace v. Greenville County*, 42 S. C. 190, 20 S. E. R. 88.

35. *State v. Archer*, *supra*.

36. *Atwood v. Scott*, 99 Mass. 177, 96 Am. Dec. 726; *Bliss v. Brainard*, 42 N. H. 255; *Kipp v. Dawson*, 59 Minn. 82.

37. *West v. State*, 1 Wis. 209.

moned by the accused. It also has been applied in civil cases.³⁸

§ 26. **Admissions and testimony given at a former trial.**—An admission, by the prosecution in a criminal case, as to the testimony a witness would give if present, does not deprive the accused of his right to process to compel his attendance in court.³⁹ Nor does the introduction of testimony given by a witness at a former trial deprive the accused of this right.⁴⁰ But actual attendance of witnesses in all cases is not guaranteed.⁴¹ On the other hand, where the attendance is procurable the officer must exercise at least ordinary diligence.⁴²

§ 27. **Exclusion of witnesses.**—The question of sequestering the witnesses during the trial is one upon which the decisions are not harmonious. Some hold that this is a matter which rests in the sound discretion of the court.⁴³ Others hold that it is a matter which is demandable of

38. *Bozek v. Redzinski*, 87 Wis. 525.

39. *State v. Richard*, 127 La. 413, 53 So. R. 669. But see *Relly v. State*, 160 Ala. 48, 49 So. R. 535.

40. *People v. Bossert*, 14 Cal. App. 111, 111 Pac. R. 15; *State v. Wilcox*, 21 S. D. 532, 114 N. W. R. 687.

41. *State v. Pope*, 78 S. C. 264, 58 S. E. R. 815.

42. *Smith v. State*, 118 Ga. 61, 44 S. E. R. 817; *State v. Pope*, *supra*; *State v. Huff*, 116 Mo. 459, 61 S. W. R. 900, 1104.

43. *McClellan v. State*, 117 Ala. 140, 23 So. Rep. 653; *People v. Considine*, 105 Mich. 149, 63 N. W. R. 196; *Com. v. Thompson*, 159 Mass.

right.⁴⁴ The former view is supported by the weight of authority. It has obtained since early times.⁴⁵ But it has not been free from criticism. "We have no hesitation in declaring that such a doctrine cannot stand the test of principle, and that it is utterly incompatible with the perfect enjoyment of the right of a fair trial guaranteed by the laws to the citizens of this country."⁴⁶

Parties to the record, who testify in the case, may not be excluded. They are entitled to be present thruout the trial.⁴⁷ Also attorneys in the case,⁴⁸ and agents of a party to the suit whose presence is desirable.⁴⁹ Moreover, expert witnesses have been held to come within this exception.⁵⁰

§ 28. Same. Effect of refusal to obey the court's order.—Upon this question also the decisions are not harmonious. Some courts hold that a witness who disobeys the court's order to be absent from the court room while other witnesses are testifying may be debarred from testifying in the case.⁵¹ This view, however, is not

44. *Shaw v. State*, 102 Ga. 660, 29 S. E. R. 477; *Watts v. Holland*, 56 Tex. 54.

45. *Vaughan's Trial*, 13 How. St. Tr. 485, 494.

46. *Rainwater v. Elmore*, 1 Heisk. (Tenn.) 363, 365.

47. *State v. Kelly*, 97 N. C. 404; *McIntosh v. McIntosh*, 79 Mich. 198, 44 N. W. R. 592.

48. *State v. Ward*, 61 Vt. 153, 179, 17 Atl. R. 483.

49. *The Zenia Real Est. Co. v. Macy*, 147 Ind. 568, 577.

50. *Johnson v. State*, 10 Tex. App. 571.

51. *Bulliner v. The People*, 95 Ill. 394; *The People v. Burns*, 67 Mich. 537; *Grant v. State*, 89 Ga. 396.

sound. Unless the party who calls the witness is at fault, as regards the latter's disobedience, he should not be deprived of the benefit of his testimony. This is undoubtedly the better view. The disobedience of the witness might effect his credibility, but it should not deprive the party who calls him of the benefit of his testimony. As said by Coffey, J.: "The rule to be deduced from these cases is that, when a party is without fault and a witness disobeys an order directing the separation of the witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility."⁵² And in such case counsel may comment upon the misconduct of the witness with the view of impeaching his credibility.⁵³ Moreover, the witness may be punished for contempt.⁵⁴

§ 29. The examination in chief. In general.—As a general rule, the right to begin the introduction of testimony belongs to the plaintiff. This is owing to the fact that the burden of proof rests upon him. After the empaneling of the jury, it is customary for the plaintiff's counsel to make a brief statement of the facts of the case. The first witness is then called to the stand, and, after being sworn, counsel for the

52. *Taylor v. The State*, 130 Ind. 66, 70.

53. *McHugh v. State*, 42 Ohio St. 154, 158; *Grimes v. Martin*, 10 Ia. 347.

54. *Taylor v. State*, *supra*; *State v. Falk*, 46 Kan. 498, 26 Pac. R. 1023; *McHugh v. State*, 42 Ohio St. 154, 158.

plaintiff proceeds to question him. 'All the material facts of the case which counsel intends to prove by him should be elicited during this direct examination. Courts do not allow witnesses to give their testimony by piece meal.⁵⁵

§ 30. **Control of the presiding judge.**—The manner and scope of the examination of witnesses, within certain limits, are matters which rest in the sound discretion of the court. "A circuit judge presiding at a trial is not a mere moderator between contending parties; he is a sworn officer, charged with grave public duties. In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice, and his action in this respect will not be reversed by this court, unless it exhibits an abuse of discretion resulting in injustice."⁵⁶ Thus, the trial judge may relax the rule which requires a party to introduce, in the first instance, all of his testimony;⁵⁷ allow the prosecution to reopen the case after the defense has rested;⁵⁸ allow new evidence after both parties have rested;⁵⁹ exclude ques-

55. *Belden v. Allen*, 61 Conn. 173, 23 Atl. 963; *Alquist v. Eagle Iron Works*, 126 Ia. 67, 101 N. W. R. 520; *Marshall v. Davies*, 78 N. Y. 414.

56. *Huffman v. Cauble*, 86 Md. 591, 596.

57. *Agate v. Morrison*, 84 N. Y. 672; *People v. McNamara*, 94 Cal. 509.

58. *State v. Rose*, 33 La. Ann. 932; *Green v. State*, 119 Ga. 120, 45 S. E. R. 990.

59. *Delaney v. Mulligan*, 148 Pa. St. 157; *Joplin Waterworks Co. v. Joplin*, 177 Mo. 496, 76 S. W. R. 960; *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318, 68 N. E. R. 1087.

tions which tend to mislead the witness,⁶⁰ or the jury;⁶¹ prevent counsel from asking improper questions;⁶² exclude indefinite and uncertain questions;⁶³ exclude questions which call for merely cumulative,⁶⁴ speculative,⁶⁵ or hearsay,⁶⁶ evidence; prevent opposing counsel from making needless interruptions;⁶⁷ prevent the witness from being too verbose;⁶⁸ exclude questions which seek to elicit testimony outside the issue,⁶⁹ and limit the number of witnesses.⁷⁰

§ 31. **Preliminary questions.**—Within reasonable limits, questions of a preliminary nature are allowable although they do not relate directly

60. *Brashears v. Orme*, 93 Md. 442, 49 Atl. R. 620.

61. *State v. Blydenburg*, 135 Ia. 264, 112 N. W. R. 634, 14 Ann. Cas. 443.

62. *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. R. 956; *Skaggs v. State*, 108 Ind. 53, 8 N. E. R. 695.

63. *Louisville, etc., Ry. Co. v. Bargainier*, 168 Ala. 567, 53 So. R. 138; *Strand v. Grinnell Auto. Gar. Co.*, 136 Ia. 68, 113 N. W. R. 488.

64. *Lake Shore, etc., Ry. Co. v. Brown*, 123 Ill. 162; *Mears v. Cornwall*, 73 Mich. 78.

65. *Alabama Gt. So. Ry. Co. v. Yount*, 165 Ala. 537, 51 So. 737.

66. *United States v. Fidelity, etc., Co. v. Damskibsaktieselskabet Habil*, 138 Ala. 348, 35 So. R. 344.

67. *State v. Scott*, 80 N. C. 365.

68. *State v. Farley*, 87 Ia. 22, 53 N. W. R. 1089.

69. *Atl. Coast Line Ry. Co. v. Crosby*, 53 Fla. 400, 43 So. R. 318.

70. *Barhyte v. Summers*, 68 Mich. 341, 36 N. W. R. 93; *Green v. Phoenix Mut. Life Ins. Co.*, 134 Ill. 310, 25 N. E. R. 583, 10 L. R. A. 576.

to matter relevant to the issue.⁷¹ Thus, a witness may be asked his age, his place of residence,⁷² etc. A female witness may be asked if she is a widow,⁷³ and a detective may be asked to state his connection with the case,⁷⁴ etc.

§ 32. **Leading questions.**—A leading question is one which is so framed that it suggests to the witness the answer desired.⁷⁵ The mere *form* of the question, however, does not necessarily determine the matter.⁷⁶ A question which suggests to the witness an answer *unfavorable* to the questioner is not objectionable.⁷⁷ At common law, a categorical question embodying a material fact was considered necessarily leading, and therefore objectionable.⁷⁸ The modern view, however, is less rigid.⁷⁹ Mr. Bentham says, "A question is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have

71. *People v. Pope*, 108 Mich. 361, 66 N. W. R. 213; *Swygart v. Willard*, 166 Ind. 25, 76 N. E. R. 755.

72. *Pittman v. Camp*, 94 N. C. 283; *Lollar v. State*, 167 Ala. 112, 52 So. R. 745.

73. *Cooper v. State*, 63 Ala. 80.

74. *People v. Wilkinson*, 14 N. Y. Suppl. 827.

75. *Coogler v. Rhodes*, 38 Fla. 240, 21 So. R. 109, 56 Am. St. Rep. 170; *Williams v. Smith*, 29 R. I. 562, 72 Atl. R. 1093.

76. *Tinsley v. Carey*, 26 Tex. 350.

77. *Cochran v. Miller*, 13 Ia. 128.

78. *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247; *Rosenkovitz v. United R., etc., Co.*, 108 Md. 306, 70 Atl. R. 108.

79. *Williams v. Smith*, *supra*; *Peebles v. O'Gara Coal Co.*, 239 Ill. 370, 88 N. E. R. 166.

confirmed by his answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form every sort of information may be conveyed to the witness in disguise.”⁸⁰ The following questions, however, have been held proper: “Do you know whether or not he bought his father’s homestead?”⁸¹ “From your knowledge and experience as engineer, was it possible to have stopped the train after you saw the plaintiff on the track?”⁸² “Did you make any agreement at that time?”⁸³ “Did you court her?”⁸⁴ “Did you do all in your power to prevent the accident?”⁸⁵ “Did the noise sound as if the person was in joy or distress?”⁸⁶ “When you hailed the car, did you stop on the sidewalk, or did you continue walking until you got near the car?”⁸⁷

On the other hand, the following questions have been held improper: “How did you address the defendant in respect to his being one of the persons concerned?”⁸⁸ “What had you

80. Bentham, *Rationale of Judicial Evid.*, Bowrings ed. VI. 338.

81. *Robertson v. Craver*, 88 Ia. 381, 55 N. W. R. 492.

82. *Galveston, H. & S. A. Ry. Co. v. Duelin*, 86 Tex. 450.

83. *Dudley v. Elkins*, 39 N. H. 78.

84. *Greenup v. Stoker*, 8 Ill. 202 (breach of promise case).

85. *Springfield Con. Ry. Co. v. Welsh*, 155 Ill. 511.

86. *Malcik v. State*, 33 Tex. Cr. Rep. 14.

87. *Olferman v. Union Depot Ry. Co.*, 125 Mo. 408.

88. *People v. Mather*, 4 Wend. (N. Y.) 229.

seen in the way of intoxicating liquors being sold in that building?"⁸⁹ "Do you know any circumstances which will show you that the defendant knew his son was at school?"⁹⁰ For other illustrations see Thompson on Trials, § 358.

The fact that the witness is apprised of the answer desired by a leading question which is withdrawn does not impair his answer given in response to a subsequent question properly framed.⁹¹ The mere fact that a question may be answered by "Yes" or "No" does not render the question leading. It must indicate which answer is expected or desired.⁹²

The term "leading," as used in this connection, is a *relative* term. Thus the form of question used might be leading when applied to one set of facts and not leading when applied to another set of facts.⁹³ As said by Mr. Best, "It should never be forgotten that 'leading' is a relative, not an absolute term. There is no such thing as 'leading' in the abstract, for the identical form of question which would be leading of the grossest kind in one case or state of facts might not only be unobjectionable, but the very fittest mode of interrogation in another."⁹⁴

89. State v. Schilling, 14 Ia. 455.

90. Floyd v. State, 30 Ala. 511.

91. Allen v. Hartford L. Ins. Co., 72 Conn. 693, 45 Atl. R. 955.

92. Floyd v. State, *supra*; Spear v. Richardson, 37 N. H. 23; Kemmerer v. Edelman, 23 Pa. St. 143.

93. People v. Niro, 149 N. Y. 317; Safford v. Horn, 72 Miss. 470; Norton v. Parsons, 67 Vt. 526.

94. Best on Evid. (10th ed.), § 641.

§ 33. **Same. Cases in which leading questions are allowable.**—As a general rule, leading questions are not allowable in the direct examination.⁹⁵ Under some circumstances, however, they are perfectly proper. Moreover, the subject is one in which the trial judge has large discretion.⁹⁶ Ordinarily, the ruling of the court is not a ground for appeal.⁹⁷ But in a clear case of abuse of discretion it is ground for reversal.⁹⁸

In the following classes of cases leading questions are allowable: (1) Where the purpose is merely to elicit certain preliminary or introductory information, such as the name of the witness, his place of residence, etc.⁹⁹ (2) Where the witness manifests hostility against the party who has called him, or bias in favor of the ad-

95. *Briggs v. People*, 219 Ill. 330, 76 N. E. R. 499; *Buckman v. Phila., etc., Ry. Co.*, 227 Pa. St. 277, 75 Atl. R. 1069; *Weatherly v. Nash., etc. Ry. Co.*, 166 Ala. 575, 51 So. R. 959; *Engleking v. Kansas City, etc., Ry. Co.*, 187 Mo. 158, 86 S. W. R. 89; *Georgetown v. Groff*, 136 Ky. 662, 124 S. W. R. 888.

96. *McDonald v. State*, 118 Ala. 672, 23 So. R. 637; *State v. Burns*, 119 Ia. 663, 94 N. W. R. 238; *Daugherty v. Heckard*, 189 Ill. 239, 59 N. E. R. 569; *St. Clair v. United States*, 154 U. S. 134.

97. *Lane Bros. & Co. v. Banserman*, 103 Va. 146, 48 S. E. R. 857, 106 Am. St. Rep. 872; *People v. Fung Ah Sing*, 70 Cal. 8.

98. *Goudy v. Werbe*, 117 Ind. 154; *Northern Pac. Ry. Co. v. Umlin*, 158 U. S. 271.

99. *People v. Hodge*, 141 Mich. 312, 104 N. W. R. 599, 113 Am. St. Rep. 525; *Cronan v. Cotting*, 99 Mass. 334.

verse party.¹⁰⁰ (3) In the cross-examination.¹ (4) Where the general memory of the witness is exhausted.² (5) Where the question of identification is involved.³ (6) Where the witness is of tender years,⁴ infirm,⁵ illiterate,⁶ etc. (7) Where the witness is interrogated by the court.

Where a question is framed in the alternative it may, or may not, be leading. It depends upon whether or not it suggests the answer desired.⁷ Where the question is whether or not a given

100. *Bradshaw v. Coombs*, 102 Ill. 428; *People v. Gillespie*, 111 Mich. 241, 69 N. W. R. 490; *Conway v. State*, 118 Ind. 482; *The Charles Morgan*, 115 U. S. 69; *Becker v. Koch*, 104 N. Y. 394, 401, 10 N. E. R. 701 ("An adverse witness may be cross-examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse, and that the danger arising from such a mode of examination by the party calling a friendly and unbiased witness does not exist").

1. *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; *Fox v. Steever*, 156 Ill. 622, 40 N. E. R. 942.
2. *Coon v. People*, 99 Ill. 368, 39 Am. Rep. 28; *Herring v. Skaggs*, 73 Ala. 446; *Farrell v. Boston*, 161 Mass. 106.
3. *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.
4. *Polson v. State*, 137 Ind. 519; *People v. Harlan*, 133 Cal. 16, 65 Pac. R. 9; *State v. Watson*, 81 Ia. 380, 46 N. W. R. 868.
5. *Cheney v. Arnold*, 18 Barb. (N. Y.) 434.
6. *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026; *State v. Burns*, 119 Ia. 663, 78 N. W. R. 681.
7. *Chicago City Ry. Co. v. Shaw*, 220 Ill. 532, 77 N. E. R. 139; *Annison Mfg. Co. v. So. Ry. Co.*, 145 Ala. 351, 40 So. R. 965; *Page v. Parker*, 40 N. H. 47; *State v. Wickliff*, 95 Ia. 386, 64 N. W. R. 282.

statement is true;⁸ or whether or not the witness knew that a given person ran a house of prostitution in a given town;⁹ or whether or not there was any agreement as to the witness taking possession of a given horse on default of payments, and if so what it was,¹⁰ it is not objectionable on the ground that it is leading.

On the other hand, a particular phrase, such as "don't you know;"¹¹ "wouldn't it be;"¹² "is it not a fact;"¹³ "isn't,"¹⁴ etc., may render the question leading.

The propriety of asking leading questions is a matter which rests largely in the discretion of the court. Where the witness is illiterate,¹⁵ ignorant,¹⁶ possessed of a poor understanding,¹⁷ embarrassed,¹⁸ not familiar with the English

8. *Williams v. Kane* (Tex.), 55 S. W. R. 362.
9. *Coogler v. Rhodes*, 38 Fla. 240, 21 So. R. 109, 56 Am. St. Rep. 170.
10. *Davis v. Millings*, 141 Ala. 378, 37 So. R. 737.
11. *Williamson Iron Co. v. McQueen*, 144 Ala. 265, 40 So. R. 306.
12. *Prather v. Chicago So. Ry. Co.*, 221 Ill. 190, 77 N. E. R. 430.
13. *Hoagland v. Canfield*, 160 Fed. R. 146.
14. *Huntington v. Lusch*, 33 Ind. App. 476, 70 N. E. R. 402.
15. *Kozik v. Czapiewski*, 136 Wis. 70, 116 N. W. R. 640.
16. *Western Tel. Co. v. Teague*, 134 Ky. 601, 121 S. W. R. 484; *Ellis v. State*, 25 Fla. 702, 6 So. R. 768.
17. *State v. Drake*, 128 Ia. 539, 105 N. W. R. 54; *Carter v. State*, 59 Tex. Cr. R. 73, 127 S. W. R. 215.
18. *State v. Drake*, *supra*; *McCann v. People*, 226 Ill. 562, 80 N. E. R. 1061.

language,¹⁹ supersensitive,²⁰ etc., it is customary to allow leading questions. It is also customary to allow leading questions as to preliminary or introductory matters;²¹ also where the purpose is to refresh the memory of the witness and aid his recollection.²² A question which suggests an answer unfavorable to the party asking it is not objectionable because it is leading.²³

For further illustrations of leading questions see cases in foot-note ²⁴. For further illustrations of questions which have been held not leading see cases in foot-note ²⁵. And for a general discussion of the subject see note, 47 Am. Dec. 82-85.

19. *Selenak v. Selenak*, 150 Ill. App. 399 (in this case the witness was badly tongue-tied and deaf); *People v. Jensen*, 66 Mich. 711, 33 N. W. R. 811.
20. *Carter v. State*, 59 Tex. Cr. R. 73, 127 S. W. R. 215.
21. *Peebles v. O'Gara Coal Co.*, 239 Ill. 370, 88 N. E. R. 166; *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. R. 201; *Huntoon v. O'Brien*, 79 Mich. 227, 44 N. W. R. 601.
22. *Gray v. Kelley*, 190 Mass. 184, 76 N. E. R. 724; *State v. Duestrow*, 137 Mo. 44, 38 S. W. R. 554, 39 S. W. R. 266; *Mann v. State*, 134 Ala. 1, 32 So. R. 704.
23. *Cochran v. Carey*, 26 Tex. 350.
24. *Granger v. Darling*, 156 Mich. 31, 120 N. W. R. 32; *Collins v. Gleason Coal Co.*, 140 Ia. 114, 115 N. W. R. 497, 118 N. W. R. 36, 18 L. R. A. N. S. 736; *Hill v. State*, 156 Ala. 3, 46 So. R. 864; *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503, 44 Pac. R. 189, 34 L. R. A. 857; *Hein v. Mildebrandt*, 134 Wis. 582, 115 N. W. R. 121; *Roth v. Travelers' Protec. Assoc.*, 102 Tex. 241, 115 S. W. R. S. W. R. 31, 132 Am. St. Rep. 871.
25. *Mayville v. French*, 246 Ill. 434, 92 N. E. R. 919; *In re Du Bois*, 164 Mich. 8, 128 N. W. R. 1092; *Combs v. Com.*,

§ 34. **Questions that are objectionable on other grounds.**—As heretofore stated, leading questions, in the direct examination, are usually objectionable. There are also other grounds which render questions objectionable. Thus, questions may be objectionable because they are too general;²⁶ or too indefinite;²⁷ or too broad;²⁸ or misleading;²⁹ or argumentative;³⁰ or because they call for improper testimony.³¹ The mere fact that the trial court allows counsel to ask impudent or insulting questions is not a ground

90 Va. 88, 17 S. E. R. 881; *Fitch v. Mason City, etc., Traction Co.*, 116 Ia. 716, 89 N. W. R. 33; *Olferman v. Union Depot Ry. Co.*, 125 Mo. 408, 28 S. W. R. 742, 46 Am. St. Rep. 483.

26. *State v. Woodard*, 132 Ia. 675, 108 N. W. R. 753; *Phillips v. State*, 162 Ala. 14, 50 So. R. 194; *State v. High*, 122 La. 521, 47 So. R. 878; *Ennis v. Little*, 25 R. I. 342, 55 Atl. R. 884; *State v. Minck*, 94 Minn. 50, 102 N. W. R. 207.
27. *Bassett v. Shares*, 63 Conn. 39, 27 Atl. R. 421; *Schmoe v. Cotton*, 167 Ind. 364, 79 N. E. R. 184; *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. R. 956; *Strickland v. State*, 151 Ala. 31, 44 So. R. 90; *Strand v. Grinnell Auto. Gar. Co.*, 136 Ia. 68, 113 N. W. R. 488.
28. *Orr v. Jason*, 1 Ill. App. 439 ("Just state what the arrangement between you and your father was?").
29. *Brashears v. Orme*, 93 Md. 442, 49 Atl. R. 620; *State v. Blydenburg*, 135 Ia. 264, 112 N. W. R. 634, 14 Ann. Cas. 443.
30. *Rollins v. State*, 160 Ala. 82, 49 So. R. 329.
31. *Atl. Coast Line Ry. Co. v. Crosby*, 53 Fla. 400, 43 So. R. 318; *Pitman v. State*, 153 Ala. 1, 45 So. R. 245; *Ala. Gt. So. Ry. Co. v. Yount*, 165 Ala. 537, 51 So. 737; *Sylvester v. Ammons*, 126 Ia. 140, 101 N. W. R. 782.

for reversal.³² The court, however, should protect the witness when such questions are asked.³³ A question which asks merely for the conclusion of the witness rather than actual facts is objectionable and should be excluded.³⁴ A question which is so vague that it is not susceptible of a definite answer is also objectionable and should be excluded.³⁵ A question framed in the alternative is objectionable and should be excluded unless the peculiar circumstances of the case render such a question necessary in order to elicit the truth.³⁶ A question which asks for both actual facts and also the conclusion of the witness is objectionable.³⁷ While repeating questions to the witness which he has answered should ordinarily be discouraged, yet this is a matter which rests in the sound discretion of the court.³⁸ A question which is good in part and bad in part should be excluded.³⁹

§35. Irresponsive answers.—An answer which is not responsive to the question asked should

32. *People v. Roat*, 117 Mich. 578, 76 N. W. R. 91.

33. *People v. Eaton*.

34. *Amer. Car, etc., Co. v. Hill*, 226 Ill. 227, 80 N. E. R. 784 ("What were they aiming to do?").

35. *Birmingham R., etc., Co. v. Hayes*, 153 Ala. 178, 44 So. R. 1032.

36. *Webster v. Clark*, 30 N. H. 245.

37. *Bell v. State*, 48 Tex. Cr. R. 256, 87 S. W. R. 1160.

38. *Tucker v. Buffalo Cotton Mills*, 76 S. C. 539, 57 S. E. R. 626, 121 Am. St. Rep. 957.

39. *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. R. 69, 27 L. R. A. N. S. 1; *Fleming v. State*, 150 Ala. 19, 43 So. R. 219.

be stricken out, if objected to by the party examining the witness.⁴⁰ But the mere fact that it is irresponsible to the question does not render the answer inadmissible.⁴¹ If the party who asks the question does not request that the irresponsible answer be stricken out it may stand.⁴² Upon objection, however, by the party who asks the question, it should be stricken out.⁴³ Moreover, the fact that several questions and answers have intervened between the irresponsible answer and the motion to strike out the latter does not render the court's order to strike out the irresponsible answer improper.⁴⁴

§ 36. Illustrations of irresponsible answers.—

The following answers have been held objectionable because irresponsible to the questions stated: "Didn't you say that was a sporting house?" "It had the reputation of being one."⁴⁵ "What is the value of your services in that case?" "I have sent a bill for \$500."⁴⁶ "State what he (the defendant in a rape case) did."

40. *Murphy v. Coppieters*, 136 Cal. 317, 68 Pac. R. 970.

41. *In re Dunahugh*, 130 Ia. 692, 107 N. W. R. 925; *Merkle v. Bennington Tp.*, 58 Mich. 156, 24 N. W. R. 776, 55 Am. Rep. 666.

42. *Chicago, etc., Ry. Co. v. Woodward*, 47 Kan. 191, 27 Pac. R. 836.

43. *State v. Skillman*, 76 N. J. L. 464, 70 Atl. R. 83; *Murray v. Walker*, 83 Ia. 202, 48 N. W. R. 1075; *Fleming v. Lunsford*, 163 Ala. 540, 50 So. R. 921.

44. *Barnard v. Bates*, 201 Mass. 234, 87 N. E. R. 472.

45. *Ramsey v. Smith*, 138 Ala. 33, 35 So. 325.

46. *Chicago v. Sutton*, 136 Ill. App. 221.

"He was always sitting trying to hug every woman that came in the house."⁴⁷ "What was it worth to keep the decedent?" "I would not keep her for less than \$5 a week."⁴⁸ "State whether or not John Doe was a professional gambler." "He was not a straight hand to gamble."⁴⁹

On the other hand, the following answers to the questions stated have been held not objectionable because not sufficiently responsive: "Was the voice you heard similar to the voice of Richard Roe" (the prosecuting witness)? "I think it was."⁴⁹ "What do you mean by saying that testatrix was weak mentally?" "Easily influenced."⁵⁰ "What effect did the construction of the Manhattan elevated railway have on your property?" "It destroyed my business entirely."⁵¹

§ 37. Impressions may fall short of positive assurance.—The fact that a witness is unable to testify *positively* does not render his testimony inadmissible. Where he is unable to recollect positively he may state his *impression* or *belief*. "An impression as to a past fact may mean personal knowledge of the fact as it rests in the memory, though the remembrance is so faint

47. *McQueary v. People*, 48 Colo. 214, 110 Pac. R. 687. See also, *Barnes v. Danville St. Ry., etc., Co.*, 235 Ill. 566, 85 N. E. R. 921, 126 Am. St. Rep. 237.

48. *Murphy v. McCarthy*, 108 Ia. 38, 78 N. W. R. 819.

49. *Pritchett v. Johnson*, 5 Neb. 49, 97 N. W. R. 223.

50. *In re Snowball*, 157 Cal. 301, 107 Pac. R. 598.

51. *Johnston v. Manhattan Ry. Co.*, 14 N. Y. Suppl. 897.

that it cannot be characterized as an undoubting recollection. . . . In this sense the impression of a witness is evidence, however indistinct and unreliable the recollection may be. No line can be drawn for the exclusion of any record left upon the memory as the impress of personal knowledge because of the dimness of the inscription."⁵² "Witnesses are not required to give their testimony with absolute positiveness. If the fact is impressed on the memory, but the recollection does not rise to positive assurance, it is still admissible to be weighed by the jury."⁵³

It is to be observed, however, that the impression or belief must be founded upon personal knowledge and not upon mere conjecture.

§ 38. **Same. Illustrations.** — In the following cases the testimony was held admissible: The witness "was confident," but "would not swear;"⁵⁴ had "belief" as to identity of a stolen mare;⁵⁵ had "belief" as to the identity of a person;⁵⁶ had "belief" as to the existence of a trade usage;⁵⁷ testified to the "best of my recollection;"⁵⁸ testified to the "best of my knowledge, belief and recollection;"⁵⁹ testified that it "ap-

52. *State v. Flanders*, 38 N. H. 332.

53. *Hoitt v. Moulton*, 21 N. H. 588.

54. *Lewis v. Freeman*, 17 Me. 260.

55. *State v. Weber*, 156 Mo. 249, 56 S. W. R. 729.

56. *State v. Cushenberry*, 157 Mo. 168, 56 S. W. R. 737.

57. *Hamilton v. Nickerson*, 13 Allen (Mass.) 352.

58. *Rhode v. Louthain*, 8 Blackf. (Ind.) 413; *McGarritty v. Byington*, 12 Cal. 426, 430.

59. *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. R. 770.

peared to be;"⁶⁰ testified that given handwriting "looks like it, can't say, I believe it to be his writing;"⁶¹ testified that his "impression" was so and so, etc.⁶²

§ 39. Refreshing of memory. Adopting past recollection.—It is important to observe that a marked distinction exists between refreshing a present recollection and adopting a past recollection. A person who acquired knowledge in the past of certain facts by observation may be unable to testify to them owing to lack of memory. In such case it is proper to submit to him a paper or memorandum which would naturally tend to refresh his memory. If its effect is to excite in his mind an independent recollection of facts to which it refers, or with which it is connected, he may testify to those facts independently of the paper.⁶³ In such case the authorship of the paper is immaterial.⁶⁴ Its purpose is merely to refresh present recollection. The

60. *Bouldin v. Massie's Heirs*, 7 Wheat. (U. S.) 153.

61. *Shitler v. Bremer*, 23 Pa. 413.

62. *Duvall's Executor v. Darby*, 38 Pa. 59; *Carrington v. Ward*, 71 N. Y. 364.

63. *Com. v. Burton*, 183 Mass. 461, 67 N. E. R. 419; *Johnson v. State*, 125 Ga. 243, 54 S. E. R. 184; *Birmingham Ry., etc., Co. v. Seaborn*, 168 Ala. 658, 53 So. R. 241; *State v. Hassan*, 149 Ia. 518, 128 N. W. R. 960; *Goodwin v. Union Ins. Co.*, 163 Mich. 41, 127 N. W. R. 790; *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. R. 518; *Taft v. Little*, 178 N. Y. 127, 70 N. E. R. 211.

64. *Com. v. Ford*, 130 Mass. 64; *Huff v. Bennett*, 6 N. Y. 337; *Davis v. Field*, 56 Vt. 426.

paper itself in such case is inadmissible.⁶⁵ As said by Ellenborough, L. C. J., "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient, and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is evidence, but the recollection of the witness."⁶⁶ And as said by Earl, J., "A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory is thus refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence."⁶⁷

If the memorandum does not excite in the mind of the witness an independent recollection of the facts to which it refers, or with which it is connected, but convinces him of the truth of those facts by reason of his previous connection with the paper, he may testify to those facts by reason of his confidence in the correctness of the memorandum, provided it was made contemporaneously with the transaction to which it refers, or soon afterward.⁶⁸ "Nor was it necessary that the witness should have had an independent recollection. . . . All that is required is that he

65. *Com. v. Jeffs*, 132 Mass. 5.

66. *Henry v. Lee*, 2 Chitty 124.

67. *Howard v. McDonough*, 77 N. Y. 592.

68. *Enid First Nat. Bank v. Yeoman*, 14 Okla. 626, 78 Pac. R. 388; *Swartz v. Chickering*, 58 Md. 290; *O. S. Richardson Fueling Co. v. Seymour*, 235 Ill. 319, 85 N. E. R. 496.

be able to swear that the memorandum is correct. There seem to be two classes of cases on this subject: (1) Where the witness by referring to the memorandum has his memory quickened and refreshed thereby; so that he is enabled to swear to an actual recollection; (2) Where the witness after referring to the memorandum undertakes to swear to the fact, yet not because he remembers it; but because of his confidence in the correctness of his memorandum. In both cases the oath of the witness is the primary, substantive evidence relied upon; in the former the oath being grounded on actual recollection, and in the latter on the faith reposed in the verity of the memorandum."⁶⁹

As previously stated, if the memorandum refreshes the present recollection of the witness, and he testifies independently of it, it is immaterial by whom it was made. If, however, it does not refresh his memory, and he has no independent recollection of the facts stated therein, but is convinced of the truth of the statements by reason of his past connection with the memorandum, still, he may not testify to its contents

69. *Davis v. Field*, 56 Vt. 426. See also, *Bank v. Zorn*, 14 S. C. 444 ("The rule upon this subject, in its broadest outline, embraces two classes of cases; first, where the witness, after referring to the paper, speaks from his own memory and depends upon his own recollection as to the facts testified to; second, where he relies upon the paper and testifies only because he finds the facts contained therein.").

unless the memorandum was made by himself.⁷⁰ It has been held, however, that where the witness has verified a document made by another the same rule applies as where he made the document himself.⁷¹

§ 40. Right of opposing counsel to inspect memorandum.—Where a memorandum is read by a witness with the view of refreshing his memory opposing counsel have the right to inspect it. Moreover, they have the right to cross-examine the witness on it. "It is always usual and very reasonable, when a witness speaks from memorandums, that the counsel should have an opportunity of looking at those memorandums when he is cross-examining that witness."⁷² And although the memorandum itself is not admissible in evidence, it is proper for the jury also to inspect it for the purpose of determining whether or not it could properly refresh the memory of the witness. "The opposite party is entitled to cross-examine the witness in regard to it; and it may be shown to the jury, not for the purpose of establishing the facts therein con-

70. *Ebersson v. Con. Inv. Co.*, 130 Mo. App. 296, 109 S. W. R. 62; *Steele v. Wisner*, 141 Pa. St. 63, 21 Atl. R. 527; *Vichos v. Cuttler*, 133 N. Y. App. Div. 230, 17 N. Y. Suppl. 366; *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Okla. 558, 24 So. R. 949; *Watson v. Miller*, 82 Tex. 279, 17 S. W. 1053.

71. *Bowden v. Spellman*, 50 Ark. 251, 27 S. W. R. 602; *Lenney v. Finley*, 118 Ga. 427, 45 S. E. R. 317; *Brown v. Smith*, 24 S. D. 231, 123 N. W. R. 689.

72. *Hardy's Trial*, 24 How. St. Tr. 824.

tained, but for the purpose of showing that it could not properly refresh the memory of the witness."⁷³

Where the memorandum does not refresh the memory of the witness, but, by reason of his previous connection with the paper, convinces him that the statements therein contained are true, and he testifies to them, the opposing counsel is entitled to inspect the memorandum and cross-examine the witness on it. As said by Dr. Greenleaf, "Where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that at the time he saw it he knew the contents to be correct . . . the writing itself must be produced in court in order that the other party may cross-examine," etc.⁷⁴

§ 41. When the memorandum itself is admissible.—Where the memorandum is used by the witness merely to refresh his memory it is not admissible.⁷⁵ On the other hand, where it fails to do this, but convinces the witness, owing to his previous connection with it, of its verity, and he testifies to this, the memorandum itself is admissible.⁷⁶

73. *Com. v. Jeffs*, 132 Mass. 5.

74. 1 Greenl. Ev., § 436.

75. *Com. v. Jeffs*, *supra*; *New England Mortg. Secur. Co. v. Anderson*, 120 Ga. 1010, 48 S. E. R. 396.

76. *Sherlock v. German-Amer. Ins. Co.*, 162 N. Y. 656, 57 N. E. R. 1124; *Manchester Assur. Co. v. Ore. Ry. Co.*, 46

It has been held that where the witness, after inspecting the memorandum, is able to testify to the contents from present recollection the memorandum is not admissible as evidence of a past recollection.⁷⁷ This view obtains in the federal courts.⁷⁸ Some courts hold that the writing is inadmissible unless it enables the witness to testify to an independent recollection.⁷⁹ But by the weight of authority the writing is admissible if the witness testifies that he made it at the time the transaction recorded took place and that he would not have made it had it not been true.⁸⁰

§ 42. **Necessity of refreshing memory.**—Before a witness may refresh his memory by reading a memorandum, it must be shown that the necessity exists for him to do so.⁸¹ Moreover, the authenticity and correctness of the memo-

Oreg. 162, 79 Pac. R. 60, 114 Am. St. Rep. 863, 69 L. R. A. 475; *Com. v. Edgerton*, 200 Mass. 318, 86 N. E. R. 768; *Graham v. Dillon*, 144 Ia. 82, 121 N. W. R. 47; *Goodwin v. Union Ins. Co.*, 163 Mich. 41, 127 N. W. R. 790.

77. *People v. McLaughlin*, 150 N. Y. 365, 44 N. E. R. 1017; *Weaver v. Bromley*, 65 Mich. 214, 31 N. W. R. 839.

78. *Vicksburg Ry. Co. v. O'Brien*, 119 U. S. 99.

79. *McNeely v. Duff*, 50 Kan. 488, 31 Pac. R. 1061; *Eastman v. State*, 48 Fla. 21, 37 So. R. 576; *Richmond v. Atkinson*, 58 Mich. 413, 25 N. W. R. 328.

80. *Holden v. Prudential Ins. Co. of Amer.*, 191 Mass. 153, 77 N. E. R. 309; *St. Paul Boom Co. v. Kemp*, 125 Wis. 138, 103 N. W. R. 259; *Martin v. Good*, 14 Md. 398, 74 Am. Dec. 545; *Graham v. Dillon*, *supra*.

81. *State v. Burns*, 25 S. D. 364, 126 N. W. R. 572.



randum must also be shown.⁸² Where the writing was made by the witness he may be compelled to refresh his memory by inspecting it.⁸³

The memorandum may be any writing or printing which would tend to refresh the memory of the witness. It may have been made by the witness himself,⁸⁴ or by another.⁸⁵ It may consist of a telegram;⁸⁶ a diary;⁸⁷ a bank deposit slip;⁸⁸ a bill of sale;⁸⁹ an account book;⁹⁰ a plat of land;⁹¹ a list of articles;⁹² a letter;⁹³ an affidavit;⁹⁴ a

82. *Jagnes v. Horton*, 76 Ala. 238.

83. *Stevens v. Worcester*, 106 Mass. 45, 81 N. E. R. 907.

84. *Bush v. Stanley*, 122 Ill. 406, 13 N. E. R. 249; *Heenan v. Forest City Paint, etc., Co.*, 138 Mich. 548, 101 N. W. R. 806; *Manchester Assur. Co. v. Oregon Ry. Co.*, *supra*.

85. *Card v. Foot*, 56 Conn. 369, 15 Atl. R. 371, 7 Am. St. Rep. 311; *Manchester Assur. Co. v. Oregon Ry. Co.*, *supra*; *Kipp v. Silverman*, 25 Mont. 294, 64 Pac. R. 884.

86. *Com. v. Burton*, 183 Mass. 461, 67 N. E. R. 419.

87. *Star Mills v. Bailey*, 140 Ky. 194, 130 S. W. R. 1017, 140 Am. St. Rep. 370.

88. *State v. Stevens*, 16 S. D. 309, 92 N. W. R. 420.

89. *McFadden v. State*, 28 Tex. App. 241, 14 S. W. R. 128.

90. *O. S. Richardson Fueling Co. v. Seymour*, 235 Ill. 319, 85 N. E. R. 496; *People v. Vann*, 129 Cal. 118, 61 Pac. R. 776.

91. *Mitchell v. Churchman*, 4 Humph. (Tenn.) 218.

92. *Ward v. D. A. Morr Trans., etc., Co.*, 119 Mo. App. 83, 95 S. W. R. 964; *Wells Whip Co. v. Tanners' Mut. F. Ins. Co.*, 209 Pa. St. 488, 58 Atl. R. 894.

93. *Baker v. Sherman*, 71 Vt. 439, 46 Atl. R. 57; *Rutherford v. Mob. Br. Bank*, 14 Ala. 92 (answer).

94. *Wise v. Loring*, 59 Mo. App. 269.

railroad ticket;⁹⁵ a book of entries from memorandum slips;⁹⁶ a memorandum of the terms of a contract;⁹⁷ a cipher memorandum;⁹⁸ leaves from the family Bible;⁹⁹ official census returns,¹⁰⁰ etc.

§ 43. Impropriety of counsel assuming facts.

—Facts which are pertinent to the issue are matters for the jury to find. Hence, ordinarily, it is improper for counsel, in questioning a witness, to assume a fact which has not been proved or admitted.¹ “The rules of law which govern in the examination of witnesses as effectually prohibit counsel from assuming in their questions any facts which are material to the point of the inquiry, but which are to be ultimately found by the jury, as other rules of law forbid the judge from assuming such facts in his instructions to the jury. In the former case, the reason of such rules does not rest merely upon the consideration that such assumption of facts might mislead the witness, but upon that of the liability of such

95. *Howard v. Chesapeake, etc., Ry. Co.*, 11 App. Cas. (D.C.) 300.

96. *Tabor State Bank v. Brewer*, 100 Ia. 576, 69 N. W. R. 1011.

97. *Neil v. Childs*, 32 N. C. 195.

98. *State v. Cardoza*, 11 S. C. 195.

99. *Curtis v. State*, 89 Ark. 394, 117 S. W. R. 521 (as to the age of the prosecutrix).

100. *United States v. Tenney*, 2 Ariz. 29, 8 Pac. R. 295.

1. *Andrews v. State*, 159 Ala. 14, 48 So. R. 858; *Hanson v. Neal*, 215 Mo. 256, 114 S. W. R. 1073; *Price v. Rosenberg*, 200 Mass. 36, 85 N. E. R. 887; *State v. Flanagan*, 111 Md. 481, 74 Atl. R. 818.

assumption or assertion of facts by counsel coming a substitute in the minds of jurors evidence, and thus calculated to mislead them. To the general rule stated above there are, however, some exceptions. Thus, counsel may assume a fact concerning which there is no controversy or dispute;³ or a fact which is a mere incident of the main fact.⁴ Moreover, the question of allowing counsel to assume as true facts not proved or admitted is a matter which rests largely in the discretion of the trial court.⁵

§ 44. Anticipating the defence.—The plaintiff may, in the first instance, introduce evidence with the view of anticipating the defence. When he pursues this course, he is precluded from subsequently replying to the defendant's evidence upon this phase of the case without the permission of the court.⁶ "As a general rule in the conduct of trials, if a party elects to proceed in the first instance with proof to anticipate the defence, he should not afterwards be allowed to offer evidence on the same point, in reply to the case made by the testimony of the defendant. To permit a party thus to divide his case leads to confusion, and gives him an unfair advantage over his adversary."⁷

2. *Haish v. Munday*, 12 Bradw. (Ill.) 539.

3. *New York Mut. L. Ins. Co. v. Allen*, 212 Ill. 134, 72 E. R. 200.

4. *Gilliland v. Dunn*, 136 Ala. 327, 34 So. R. 25.

5. *State v. Empting*, (N. D.) 128 N. W. R. 1119.

6. *Holbrook v. McBride*, 70 Mass. 215.

7. *York v. Pease*, 68 Mass. 282.

§ 45. **The cross-examination.—In general.**—When the direct examination of a witness is concluded he is turned over to the opposing counsel for cross-examination. The object of this examination is to elucidate the truth as to the facts testified to in the direct examination, and to weaken or disprove the direct testimony. Where the direct testimony of a witness is very weak, or incomplete and unsatisfactory, ordinarily it is better to forgo cross-examining him. A cross-examination in such case would naturally tend to strengthen his testimony, and it would also afford the party who called him an opportunity for re-examination.

§ 46. **Scope of the cross-examination.**—As to the scope of the cross-examination there is a marked distinction between the English rule and the American rule. According to the English rule the cross-examination may extend to any matter legally relevant to the case.⁸ But according to the American rule it is limited to matters brought out in the direct examination.⁹ This

8. *Mayor, etc., v. Murray*, 19 L. J. (Ch.) 281; *Seph. Dig. Evid.*, art. 127.

9. *Emerson v. Fleming*, 246 Ill. 353, 92 N. E. R. 890; *Reeves v. Brown*, 80 Kan. 292, 102 Pac. R. 840; *Blumquist v. Snare, etc., Co.*, 200 N. Y. 595, 94 N. E. R. 1092; *Com. v. Fencez*, 226 Pa. St. 114, 75 Atl. R. 19; *Kirby v. State*, 151 Ala. 66, 44 So. R. 38; *Jenkins v. State*, 58 Fla. 62, 50 So. R. 582; *Collins v. Wells*, 140 Ia. 304, 118 N. W. R. 401; *Dralle v. Reedsburg*, 140 Wis. 319, 122 N. W. R. 771; *State v. Byrd*, 41 Mont. 585, 111 Pac. R. 407; *State v. Gosey*, 111 La. 616, 35 So. R. 786; *Woods v. Faurot*, 14 Okla. 394, 108 Pac. 1005.

rule obtains in the federal courts.¹⁰ The English rule, however, has been followed in the following states: Arizona,¹¹ Arkansas,¹² Georgia,¹³ Kentucky,¹⁴ Maine,¹⁵ Massachusetts,¹⁶ Michigan,¹⁷ Mississippi,¹⁸ Missouri,¹⁹ North Carolina,²⁰ South Carolina,²¹ Tennessee²² and Virginia.²³

§ 47. **Same. The American rule correct upon principle.**—The reason why the American rule is correct upon principle is tersely stated by Walker, C. J., as follows: "It seems to be the well recognized rule that when a witness is called by one party the other has only the right to cross-examine upon facts to which he testified in chief. If he can give evidence beneficial to the other party he should call him at the proper time, and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on such evidence in chief.

10. *Wills v. Russell*, 100 U. S. 621, 25 L. ed. 607; *Sauntry v. United States*, 117 Fed. R. 132, 55 C. C. A. 80.
11. *Rush v. French*, 1 Ariz. 99, 25 Pac. R. 816.
12. *Bispham v. Turner*, 83 Ark. 331, 103 S. W. R. 1135.
13. *Ficken v. Atlanta*, 114 Ga. 970, 41 S. E. R. 58.
14. *Bruton v. Eddington Griffiths Constr. Co.*, (Ky.) 118 S. W. R. 1001.
15. *Falmouth v. Windham*, 63 Me. 44.
16. *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. R. 788.
17. *Cairbre v. McQuillen*, 162 Mich. 679, 127 N. W. R. 750.
18. *Walton v. State*, 87 Miss. 296, 39 So. R. 689.
19. *State v. Martin*, 229 Mo. 620, 129 S. W. R. 881.
20. *Smith v. Atl., etc., Ry. Co.*, 147 N. C. 603, 61 S. E. R. 575.
21. *Brown v. Foster*, 41 S. C. 118, 19 S. E. R. 299.
22. *Sands v. So. Ry. Co.*, 108 Tenn. 1, 64 S. W. R. 478.
23. *Richards v. Com.*, 107 Va. 881, 59 S. E. R. 1104.

Otherwise the party calling the witness would be deprived of a cross-examination as to evidence called out by the other side, and the party against whom the witness was first called would obtain the advantage of getting evidence under the latitude allowed in a cross-examination."²⁴

In speaking of the American rule, Craig, J., says, "When a witness is called to prove a single fact, the opposite party, under the guise of a cross-examination, can not enter upon a general examination of the witness, but the cross-examination must be confined to the examination in chief. This rule, we apprehend, is well established by the authorities."²⁵ While the American rule is undoubtedly supported by the great weight of American authority, and is correct upon principle, yet the courts of some thirteen states, as indicated above, have followed the English rule.

§ 48. The American rule liberally construed.—The American rule, which confines the cross-examination to matters brought out in the direct examination, is usually given a liberal interpretation. It allows questions concerning inferences and conclusions which grow out of the direct

24. *Stafford v. Fargo*, 35 Ill. 481, 486.

25. *State v. Rumpfelt*, 228 Mo. 443, 128 S. W. R. 737; *Amer. Car, etc., Co. v. Alex. Water Co.*, 218 Pa. St. 542, 67 Atl. R. 861; *Ill. Cent. Ry. Co. v. Prickett*, 210 Ill. 140, 71 N. E. R. 435; *Welch v. Spies*, 103 Ia. 389, 72 N. W. R. 548; *Grill v. O'Dell*, 113 Md. 625, 77 Atl. R. 984; *Eames v. Kaiser*, 142 U. S. 488.

examination. Moreover, questions which do not elicit new subjects, but merely tend to elicit answers which explain, modify, rebut or contradict matter brought out in the direct examination are not objectionable,²⁶

§ 49. Scope of the rule where the credibility of the witness is involved.—Where the cross-examination concerns the accuracy, veracity or credibility of the witness great latitude is allowed.²⁷ Especially where the questions call for answers which concern facts material to the issue.²⁸ The mere fact that the questions call for answers which tend to disgrace the witness does not render them objectionable.²⁹ But where the answers would tend to criminate the witness he may, of course, refuse to answer them. An exception to this rule is where the accused takes the stand. In such case he is bound to answer all questions which are relevant to his direct examination. "He cannot claim the advantage of the position of a witness, and at the same time avoid its duties and responsibilities."³⁰

26. *Chicago City Ry. v. Creech*, 207 Ill. 400, 69 N. E. R. 9; *State v. Miller*, 190 Mo. 449, 89 S. W. R. 377; *People v. Manasse*, 153 Cal. 10, 94 Pac. R. 92.

27. *Real v. People*, 42 N. Y. 270, 280; *Goonbow v. People*, 160 Ill. 438; *Howser v. Commonwealth*, 51 Pa. St. 332; *State v. O'Brien*, 81 Ia. 93; *Neal v. Neal*, 58 Cal. 287.

28. *Commonwealth v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346 (for acts of adultery); *Smith v. Yaryan*, 69 Ind. 445, 35 Am. Rep. 346 (bastardy case; intercourse with other man).

29. *Real v. People*, *supra*.

30. *Brandon v. People*, 42 N. Y. 265. See also, *Commonwealth v. People*, 42 N. Y. 265.

§ 50. **Same. Application of the rule to collateral and irrelevant matters.**—Where the object is to impeach the credibility of the witness, may he be required to answer questions whose answers would tend to degrade or disgrace him, but not to criminate him, and which are collateral and irrelevant to the issue? Upon this question the decisions are not harmonious. Mr. Stephen says, "When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend (1) to test his accuracy, veracity or credibility, or (2) to shake his credit by injuring his character. Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the court has a right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter to which he is required to testify."³¹

Many courts have held that the cross-examination should not be extended to collateral and

Nichols, *supra*; People v. Tice, 131 N. Y. 651, 30 N. E. R. 494; People v. Duponee, 133 Mich. 1, 94 N. W. R. 388; Spies v. People, 122 Ill. 1, 12 N. E. R. 865, 17 N. E. R. 898, 3 Am. St. R. 320; Com. v. Smith, 163 Mass. 411, 40 N. E. R. 189.

31. Steph. Dig. Evid., art. 129.

irrelevant matters.³² On the other hand, other courts have taken a more liberal view.³³ This view is based chiefly on the ground that the cross-examination constitutes the strongest test of truth; and in the interest of justice the feelings of the witness, which are matters of secondary importance, should give way.

It has been held prejudicial error for the trial court to compel the accused, who was on trial for murder, and who had testified on his own behalf, to state, in his cross-examination, whether or not he had visited saloons, drank and played cards.³⁴ It also has been held that the fact that the witness is a deserter from the army,³⁵ or that he is an atheist,³⁶ has no bearing on the question of his credibility.

32. *Larabee v. Larabee*, 240 Ill. 576, 88 N. E. R. 1037; *State v. Blackburn*, 136 Ia. 743, 114 N. W. R. 531; *State v. Gereke*, 74 Kan. 196, 86 Pac. 160, 87 Pac. 759; *Tinkle v. Wallace*, 167 Ind. 382; *Doughlass v. State*, 53 Fla. 27, 43 So. 424; *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. R. 665; *Metro. St. Ry. Co. v. Walsh*, 197 Mo. 392, 94 S. W. R. 860; *People v. Van Tassel*, 156 N. Y. 651, 51 N. E. R. 274.

33. *State v. Abbott*, 65 Kan. 139, 69 Pac. R. 160 (illicit acts); *Goon Bow v. People*, 160 Ill. 438, 43 N. E. R. 593 (keeping opium joint); *Louisville & N. Ry. Co. v. Bizzell*, 131 Ala. 429, 30 So. R. 777 (drunkenness); *People v. Giblin*, 115 N. Y. 196, 21 N. E. R. 1062 (counterfeiting); *State v. Wells*, 54 Kan. 161, 37 Pac. R. 1005 (acts of violence).

34. *Hayward v. People*, 96 Ill. 492, 502.

35. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 83 Tex. 628, 19 S. W. R. 151.

36. *People v. Copsey*, 71 Cal. 548, 12 Pac. R. 721.

It is proper for the trial court of its own motion to exclude questions on the cross-examination which relate merely to irrelevant matters.³⁷

§ 51. Rule where question relates to previous statements.—Where counsel, in cross-examining a witness, asks him to state whether or not he made a prior statement as to the matter testified to by him on his direct examination, and he answers in the affirmative, counsel for the party who called him may, at this point, ask the witness to state whether or not the prior statement was verbal or in writing. And if he says it was in writing, the writing itself must be produced, or its non-production satisfactorily accounted for, before the witness may give secondary evidence of its contents.³⁸

§ 52. Questions which concern collateral specific misconduct of the witness.—Upon this point the decisions are not harmonious. The extent to which this class of questions is allowable on cross-examination is a matter which rests largely in the discretion of the trial court. Much may depend upon the circumstances of the particular case. Where they are such as to render the questions unjust and uncalled for they should be ex-

37. *Wells v. Missouri-Edison Electric Co.*, 108 Mo. App. 607, 84 S. W. R. 204.

38. *Lange v. Schoettler*, 115 Cal. 388; *Cafney v. People*, 50 N. Y. 416; *State v. Lowry*, 42 W. Va. 205; *Putnam v. United States*, 162 U. S. 687.

39. *Com. v. Foster*, 182 Mass. 276, 65 N. E. R. 391; *Steen v. Santa Clara v. M. & L. Co.*, 134 Cal. 355, 66 Pac. 321;

cluded.³⁹ Questions involving specific acts of unchastity on the part of the witness;⁴⁰ or specific acts of violence;⁴¹ gambling;⁴² fraud;⁴³ illegality,⁴⁴ etc., have been held improper. It also has been held that a witness should not be asked on his cross-examination whether or not he has been expelled from church;⁴⁵ or disbarred from practicing law;⁴⁶ or discharged from the army.⁴⁷ On the other hand similar questions have been allowed.⁴⁸

Where a party to the action takes the stand in his own behalf considerable latitude is allowed on the cross-examination. Thus, he may be asked how many times he has been arrested;⁴⁹ whether

Crawford v. State, 112 Ala. 1, 21 So. R. 214; State v. Haab, 105 La. 230, 29 So. R. 725; People v. Gotshall, 123 Mich. 474, 82 N. W. R. 274.

40. People v. Tiley, 84 Cal. 651, 24 Pac. R. 290.

41. State v. Carson, 66 Me. 116; Buel v. State, 104 Wis. 132, 80 N. W. R. 78.

42. People v. Un Dong, 106 Cal. 88, 39 Pac. R. 12.

43. Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

44. Com. v. McDonald, 110 Mass. 405.

45. People v. Dorothy, 156 N. Y. 237, 50 N. E. R. 800.

46. Smith v. Castles, 1 Gray (Mass.) 108.

47. State v. Spotted Hawk, 22 Mont. 339, 55 Pac. R. 1026.

48. State v. Abbott, 65 Kan. 139, 69 Pac. R. 160 (illicit acts); State v. Wells, 54 Kan. 161, 37 Pac. R. 1005 (acts of violence); City of South Bend v. Hardy, 98 Ind. 577 (fraud); Goon Bow v. People, 160 Ill. 438, 43 N. E. R. 593 (illegal acts); People v. Webster, 139 N. Y. 73, 34 N. E. R. 730 (illicit acts); People v. McCormick, 135 N. Y. 663, 32 N. E. R. 26 (acts of violence).

49. Hill v. State, 42 Neb. 503; Conners v. People, 50 N. Y. 240.

or not he has been in jail or penitentiary;⁵⁰ how often he has been in jail;⁵¹ how much time he has spent in jail;⁵² whether or not he has ever been arrested before for stealing,⁵³ etc. Ordinarily, however, collateral, irrelevant or immaterial questions should be excluded.⁵⁴

As regards the meaning of the term "collateral," as used in this connection, it has been held, that any matter which the cross-examining party is not entitled to go into in chief is collateral.

§ 53. Collateral matter brought out in direct examination. — Where improper testimony is given by the witness in his direct examination, and it is not stricken out, opposing counsel has the right to cross-examine him on it.⁵⁶ But where such testimony has been ruled out, any question on cross-examination which calls for an

50. *Real v. People*, 42 N. Y. 270.

51. *State v. Martin*, 124 Mo. 514; *Leland v. Kauth*, 47 Mich. 508.

52. *Lights v. State*, 21 Tex. App. 308.

53. *Brandon v. People*, 42 N. Y. 265.

54. *Palmer v. Matthews*, 162 N. Y. 100, 56 N. E. R. 501; *Beans v. Denny*, 141 Ia. 52, 117 N. W. R. 1091; *Norton v. Griffin*, 160 Mass. 236, 35 N. E. R. 462; *Curren v. Ampersee*, 96 Mich. 553, 56 N. W. R. 87; *Just v. Idaho Canal, etc., Co.*, 16 Ida. 639, 102 Pac. R. 381, 133 Am. St. Rep. 140; *Bell v. Jamison*, 102 Mo. 71, 14 S. W. R. 714.

55. *Dotterer v. State*, 172 Ind. 357, 88 N. E. R. 689, 30 L. R. A. N. S. 846.

56. *People v. Barry*, 196 N. Y. 507, 89 N. E. R. 1107; *Lydia Pinkham Medicine Co. v. Gibbs*, 108 Ga. 138, 33 S. E. R. 945.

answer that would bring out the collateral testimony should be excluded.⁵⁷

§ 54. Voluntary statements in direct examination.—Where a witness makes voluntary statements in his direct examination, not called for at all by counsel, and they are not ruled out, has the opposing counsel the right to cross-examine him on the subject-matter of this testimony? Upon this point the decisions are conflicting. Some courts have answered it in the affirmative,⁵⁸ and some in the negative.⁵⁹

§ 55. Rule where a witness is called to the stand by the court.—The trial judge may call a witness to the stand of his own motion, and examine him. In such case neither party to the suit has the right to cross-examine him.⁵⁹ The court may, however, in its discretion, allow the witness to be cross-examined by either or both parties. But a general fishing cross-examination ought not to be permitted.

Where the trial judge examines a witness he may ask him leading questions. And leading questions are always allowable in the cross-examination.

§ 56. Right to cross-examine where preliminary examinations are made by the court.—

57. *Spear v. Richardson*, 37 N. H. 23.

58. *State v. Adams*, 108 Mo. 208, 18 S. W. R. 1000; *Apple v. Marion County*, 127 Ind. 553, 27 N. E. R. 166.

59. *People v. French*, 95 Cal. 371, 30 Pac. R. 567; *Brusberg v. Milwaukee, etc., Ry. Co.*, 55 Wis. 106, 12 N. W. R. 416; *Kilgore v. State*, 124 Ala. 24, 27 So. R. 4.

Ordinarily, where preliminary examinations are made by the court to determine the competency of witnesses, the admissibility of testimony, etc., counsel do not have the right to cross-examine.⁶⁰ The testimony in such cases is addressed to the court and not to the jury. But where secondary evidence is sought to be introduced to prove the contents of a writing which is alleged to be lost, and witnesses testify to the loss of the instrument, opposing counsel have the right to cross-examine them. Their testimony in such case is addressed to the judge, in order that he may decide the question of admissibility of the secondary evidence; but this fact does not deprive opposing counsel of the right to cross-examine the witness. "The affidavit of a party, on the question of loss of paper, may be admitted to exclude any presumption that he may have it in his possession; but those who may be admitted as witnesses must testify in the usual form in order that the advantage of cross-examination may be preserved."⁶¹

§ 57. Answers of a witness which may not be contradicted.—Answers given by a witness in his cross-examination which are material to the issue may be contradicted; but those which are collateral to the issue may not be contradicted.⁶² It has been held that matters of veracity and

60. *Com. v. Morrell*, 99 Mass. 542.

61. *Poignard v. Smith*, 8 Pick. (Mass.) 272. See also, *Becker v. Quigg*, 54 Ill. 390, 395.

62, *Brittain v. State*, 36 Tex. Cr. R. 406, 37 S. W. R. 758.

bias of a witness are not collateral to the issue.⁶³ Upon this point, however, the authorities are not harmonious.

§ 58. Rule where opposing counsel are deprived of opportunity to cross-examine.—Where opposing counsel is deprived of an opportunity to cross-examine a witness who has given direct testimony, thru no fault on his part, as where the witness becomes suddenly ill, or dies before an opportunity is afforded for cross-examination, the direct testimony must be stricken out.⁶⁴ Instances of this kind, however, are comparatively rare.

§ 59. Self-contradiction on cross-examination.—It is allowable on cross-examination to ask a witness whether or not he made prior statements contradictory to his present testimony. This question may have a double purpose. One to impeach his credibility at once, in case he admits that he made prior inconsistent statements, or because confused, or manifests uncertainty in regard to the matter. The other to lay a foundation for introducing direct testimony that the witness did make prior inconsistent statements, in case that he denies that he did.⁶⁵ In the latter case if the statements are not material to the issue the cross-examiner is bound by the an-

63. *Combs v. Winchester*, 39 N. H. 13, 19; *Day v. Stickney*, 14 Allen (Mass.) 255.

64. *People v. Cole*, 43 N. Y. 508.

65. *Welch v. Abbott*, 72 Wis. 512, 40 N. W. R. 223.

swer.⁶⁶ In formulating his question, it is incumbent on the cross-examiner to identify with reasonable clearness the time and the place of the alleged inconsistent statements.⁶⁷

Where the alleged inconsistent statements are in writing, and the witness admits that he made it, the writing is admissible in evidence.⁶⁸ It is not essential, however, to produce the writing.⁶⁹

§ 60. Rule where witness is sworn but does not testify.—Upon this question the authorities do not agree. Mr. Stephen says that, whenever a witness has been intentionally sworn the opposite party has the right to examine him.⁷⁰ And it is said that it is “no reason for rejecting or striking out the cross-examination of a witness that he has not given any testimony in chief, or that his testimony in chief has been stricken out.”⁷¹ On the other hand, it has been held that merely calling a witness and swearing him does not entitle the adverse party to cross-examine

66. *Alexander v. Kaiser*, 149 Mass. 321, 21 N. E. R. 376; *Com. v. Hourigan*, 89 Ky. 305, 311, 12 S. W. R. 550; *State v. Crouse*, 86 N. C. 617; *Carpenter v. Ward*, 30 N. Y. 243.

67. *Campbell v. Campbell*, 138 Ill. 612, 615, 28 N. E. R. 1080; *People v. Devine*, 44 Cal. 452; *Mattox v. United States*, 156 U. S. 237, 245, 15 Sup. Ct. 337.

68. *Gaffney v. People*, 50 N. Y. 416, 423.

69. *Town of Randolph v. Town of Woodstock*, 35 Vt. 291, 295.

70. *Steph. Dig. Evid.*, art. 126.

71. *Turnbull v. Richardson*, 69 Mich. 400, 416, 37 N. W. R. 499, 507.

him.⁷² Upon principle, the latter view seems correct. It is common practice to swear all the witnesses which one party intends to call. After the witnesses are sworn, he may decide not to call one or more of them; and it seems absurd that the adverse party, under these circumstances, would have the right to cross-examine witnesses who have given no direct testimony.

§ 61. Importance of cross-examination. Its dangers.—The right of cross-examination is an exceedingly important one. It affords the most efficacious test for the discovery of truth that has ever been applied. The right to be confronted with the witness, and to sift the truth out of the mingled mass of ignorance, prejudice, passion, and interest, in which it is very often hid, is among the very strongest bulwarks of justice.⁷³ As said by Dean Wigmore, "It is beyond any doubt the greatest legal engine ever invented for the discovery of truth."⁷⁴ And as said by Dr. Greenleaf, "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious tests, which the law has devised for the discovery of truth. . . . It is not easy for a witness, who is subjected to this test, to impose on a court or jury; for however artful the fabrication of falsehood may be, it cannot embrace all

72. *Austin v. State*, 14 Ark. 555, 563; *Toole v. Nichol*, 43 Ala. 406.

73. *McCloskey v. Leadbetter*, 1 Ga. 551, 555.

74. *Wigmore on Evid.*, Vol. II., § 1367.

the circumstances to which a cross-examination may be extended."⁷⁵

It is well to observe, however, that the legal engine of cross-examination is as dangerous as it is powerful. In the hands of a skillful advocate it is a most powerful weapon, but in the hands of an unskillful advocate it is a very dangerous one. When the principles upon which it is based are not understood and acted upon it is most likely to react adversely against the party who uses it.⁷⁶

§ 62. Leading questions allowable. — While leading questions are not usually allowable on the direct examination they are usually permitted on the cross-examination.⁷⁷ It has been held, however, that the trial court may refuse to allow leading questions even on the cross-examination.⁷⁸

§ 63. Impertinent questions improper. — Insulting or impertinent questions should be excluded even on the cross-examination.⁷⁹ But

75. 1 Greenleaf on Evid., § 446.

76. Borrett v. Pety, 148 Ill. App. 622.

77. People v. Considine, 105 Mich. 149, 63 N. W. R. 196; Hempton v. State, 111 Wis. 127, 86 N. W. R. 596; State v. Boice, 114 La. 856, 38 So. R. 584; State v. Hanlon, 38 Mont. 557, 100 Pac. R. 1035.

78. Gordon v. State, 140 Ala. 29, 36 So. R. 1009.

79. Libby v. Cook, 222 Ill. 206, 78 N. E. R. 599; People v. Durrant, 116 Cal. 179, 48 Pac. R. 75.

questions are not improper merely because the answers tend to disgrace the witness.⁸⁰

§ 64. Questions which call for new matter objectionable.—Questions which call for new matter are improper and should be excluded.⁸¹

§ 65. Assuming facts not in issue objectionable.—While it has been held allowable to extend the cross-examination to facts not in issue where the object in doing so is to test the recollection of the witness,⁸² ordinarily it is objectionable for counsel, even on the cross-examination, to assume facts not in evidence.⁸³

§ 66. Argumentative questions improper.—While considerable latitude is allowed counsel on the cross-examination, argumentative questions are objectionable and should be excluded.⁸⁴

§ 67. Repeating questions, or testimony, objectionable.—As a general rule, it is improper for counsel to repeat questions either in the same form or in a different form.⁸⁵ And it is also im-

80. *Gombow v. People*, 160 Ill. 438; *Com. v. Curtis*, 97 Mass. 574.

81. *Hawks v. Rhoads*, 128 Ill. 404; *Lawdler v. Henderson*, 36 Kan. 754.

82. *State v. Ellwood*, 17 R. I. 763; *State v. Duffy*, 57 Conn. 525.

83. *Com. v. Nelson*, 180 Mass. 83, 61 N. E. R. 802; *Moore v. State*, 40 Tex. Cr. R. 439, 50 S. W. R. 942; *State v. Williams*, 111 La. 205, 35 So. R. 521.

84. *People v. Harlan*, 133 Cal. 16, 65 Pac. R. 9.

85. *Quincy Gas, etc., Co. v. Bauman*, 203 Ill. 295, 67 N. E. R. 807; *Murphy v. Hoagland*, 107 S. W. R. 303, 32 Ky. L.

proper, as a general rule, for the witness to repeat testimony already given by him.⁸⁶ This is a matter, however, that rests in the discretion of the court.⁸⁷ Where the object is to test the recollection and accuracy of the witness, repetition has been allowed.⁸⁸

§ 68. Proving conviction of crime.—By statute, in practically all of the states, the fact that a witness has been convicted of a crime may be brought out on the cross-examination.⁸⁹ At the common law, however, the best evidence of this fact is the record itself; and in the absence of a statute the record must be produced.⁹⁰

§ 69. Proving arrest and indictment.—As to whether or not it is proper to ask a witness on his cross-examination whether he has ever been arrested or indicted, the decisions are conflicting. Upon principle the question is improper and should be excluded. The mere fact of arrest or indictment of a witness is not proof of any misconduct on his part. Some courts, however,

Rep. 839; *People v. Considine*, 105 Mich. 149, 63 N. W. R. 196; *McBride v. McBride*, 142 Ia. 169, 120 N. W. R. 709.

86. *State v. Lee*, 228 Mo. 480, 128 S. W. R. 987; *Short v. East St. Louis*, 140 Ill. App. 173.

87. *Garland v. State*, 112 Md. 83, 75 Atl. R. 631; *McBride v. McBride*, *supra*.

88. *Beers v. Payment*, 95 Mich. 261, 54 N. W. R. 886.

89. *Spiegel v. Hayes*, 118 N. Y. 660, 22 N. E. R. 1105.

90. *Paulson v. State*, 118 Wis. 89, 94 N. W. R. 771; *Huff v. State*, 104 Ga. 384, 30 S. E. R. 808.

hold that the question is proper.⁹¹ It is probable, however, that this view is against the weight of authority.⁹²

§ 70. Proving that witness has been imprisoned.—There is also conflict in the decisions as to the propriety of asking a witness, on cross-examination, whether or not he has served time in jail or penitentiary. Some courts hold that in the interest of justice the witness should be required to answer the question.⁹³ Other courts, however, hold the contrary.⁹⁴ Some hold that proof of imprisonment is sufficient to infer a conviction.⁹⁵

§ 71. When answer is conclusive.—When a witness is asked a question on cross-examination, the answer to which is irrelevant to the issue, the witness may not be contradicted. Thus, where a witness is asked whether or not he has ever been arrested or served time in the penitentiary, and he answers in the negative, testimony is inadmissible to contradict him.⁹⁶

91. *People v. Foote*, 93 Mich. 38, 52 N. W. R. 1036; *State v. Greenberg*, 59 Kan. 404, 53 Pac. R. 61; *Koch v. State*, 126 Wis. 470, 106 N. W. R. 531, 3 L. R. A. (N. S.) 1086; *Parker v. State*, 136 Ind. 284, 35 N. E. R. 1105.

92. *Roop v. State*, 58 N. J. L. 479, 34 Atl. 749; *People v. Silva*, 121 Cal. 668, 54 Pac. R. 146; *Van Bokkelein v. Berdell*, 130 N. Y. 141, 29 N. E. R. 254.

93. *Real v. People*, 42 N. Y. 265.

94. *State v. Hogan*, 115 Ia. 455, 88 N. W. R. 1074.

95. *Buel v. State*, 104 Wis. 132, 80 N. W. R. 78.

96. *Brittain v. State*, 36 Tex. Cr. R. 406, 37 S. W. R. 758; *People v. Roemer*, 114 Cal. 51; *State v. McCann*, 16 Wash. 249.

§ 72. **Extent of the cross-examination.**—The mode and extent of the examination of witnesses rest in the sound discretion of the court. And this is true not only as to the direct examination but also as to the cross-examination. The trial court, however, must not unduly restrict the cross-examination.⁹⁷ On the other hand, where counsel pursues a course which is unfair to the witness, or which is improper for any other reason, the court may, of its own motion, restrict counsel within reasonable limits.⁹⁸

§ 73. **Preliminary questions on cross-examination.**—It is customary for counsel, on cross-examination of a witness, to ask him questions pertaining to his relations with the party who called him; and also as to his feelings toward the adverse party.⁹⁹ These preliminary questions are proper, as they tend to bring out information concerning his bias or prejudice as to these parties. This class of questions, however, should be restricted within reasonable limits. Thus, where the witness is asked on cross-examination to state his feelings towards the *husband* of the party on whose behalf he is

97. *Kalk v. Fielding*, 50 Wis. 339; *Reiser v. Portere*, 106 Mich. 102, 63 N. W. R. 1041; *Patrick v. Crowe*, 15 Colo. 543.

98. *People v. Kindra*, 102 Mich. 147; *Hamilton v. Miller*, 46 Kan. 486; *Com. v. Lyden*, 113 Mass. 452; *Storm v. United States*, 94 U. S. 76.

99. *Gutterson v. Morse*, 58 N. H. 165; *Schultz v. Third Ave. Ry. Co.*, 89 N. Y. 242.

cross-examined the question should be excluded.¹⁰⁰

§ 74. **The redirect examination.**—At the close of the cross-examination of a witness the party who called him may reinterrogate him.¹ This re-examination, however, should be restricted to matters brought out on the cross-examination.² It extends, however, to all new matter brought out on the cross-examination.³ The witness may give reasons for,⁴ and explain, statements made by him on the cross-examination. He may explain statements made on his cross-examination although the explanatory testimony would have been inadmissible on his direct examination.⁵ But new matter, not brought out on his cross-examination, should be excluded.⁶

100. *State v. Montgomery*, 28 Mo. 594.

1. *State v. Cochran*, 147 Mo. 504, 49 S. W. R. 558; *Houseman v. Belle Plaine*, 124 Ia. 510, 100 N. W. R. 343; *People v. McArron*, 121 Mich. 1, 79 N. W. R. 944; *Lury v. New York, etc., Ry. Co.*, 205 Mass. 540, 91 N. E. R. 1018.
2. *Colquit v. State*, 107 Tenn. 381, 64 S. W. R. 713; *Cusick v. Whitcomb*, 173 Mass. 330, 53 N. E. R. 815; *Ballew v. United States*, 160 U. S. 187, 16 S. Ct. 263, 40 L. ed. 388.
3. *State v. Williams*, 111 La. 179, 35 So. R. 505; *Hamilton v. Miller*, 46 Kan. 486, 26 Pac. R. 1030; *Com. v. Dill*, 156 Mass. 226, 30 N. E. R. 1016; *People v. Noblett*, 184 N. Y. 612, 77 N. E. R. 1193; *People v. Robinson*, 135 Mich. 511, 98 N. W. R. 12; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. R. 947.
4. *State v. Kaiser*, 124 Mo. 651, 28 S. W. R. 182; *People v. Pyckett*, 99 Mich. 613, 58 N. W. R. 621.
5. *State v. Orrell*, 75 N. C. 434, 69 S. E. R. 422.
6. *People v. Van Eman*, 111 Cal. 144; *Carlson v. Winterson*, 147 N. Y. 652; *Ballew v. United States*, *supra*.

§ 75. **Same. Conversations, etc.** — Where a witness testifies on his cross-examination to part of a conversation, the party who called him may, on the redirect examination, bring out the rest of it.⁷ This rule also applies to statements⁸ and transactions⁹ in general. According to some decisions a broader latitude is allowed in the case of conversations made with a party to the suit than is allowed in the case of conversations with a third party. In the latter case it is limited to testimony that may explain or qualify the matter brought out on the cross-examination; but in the former case any matter which pertains to the subject-matter of the suit may be shown. "The conversations of a party to a suit relative to the subject-matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not prop-

7. *Nichols v. Nichols*, *supra*; *Jackson v. State*, 167 Ala. 44, 52 So. R. 835; *Chicago City Ry. Co. v. Lowitz*, 218 Ill. 24, 75 N. E. R. 755; *Quigley v. Baker*, 169 Mass. 303, 47 N. E. R. 1007; *State v. Saidell*, 70 N. H. 174, 46 Atl. R. 1033, 85 Am. St. Rep. 627.

8. *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. R. 633; *Wilkinson v. Eilers*, 114 Mo. 245, 21 S. W. R. 514.

9. *Lang v. Klatt*, 135 Mich. 262, 97 N. W. R. 708; *Fitzpatrick v. State*, 37 Tex. Cr. R. 20, 38 S. W. R. 806.

erily connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit."¹⁰

On the redirect examination it is allowable for the party who called the witness to bring out the details of a transaction testified to by him on his cross-examination,¹¹ and also the surrounding circumstances.¹² But, as a general rule, new matter should be excluded.¹³

§ 76. Witness discredited on cross-examination.—Where a witness is discredited by testimony brought out on his cross-examination the party who called him may bring out testimony on his redirect examination that tends to rehabilitate him.¹⁴ Thus, where a woman, on her cross-examination, admits that she has not always led a virtuous life, it is proper to bring out on her redirect examination that she has reformed.¹⁵

§ 77. Rule as regards irrelevant testimony.—Ordinarily, irrelevant testimony is not allowed on

10. *Com. v. Bishop*, 165 Mass. 148.

11. *People v. Ryder*, 151 Mich. 187, 114 N. W. R. 1021; *Breedlove v. Breedlove*, 27 Ind. App. 560, 61 N. E. R. 797 (divorce case).

12. *State v. McClellan*, 23 Mont. 532, 59 Pac. R. 924, 75 Am. St. Rep. 558; *Walkley v. Clarke*, 107 Ia. 451, 78 N. W. R. 70.

13. *Carlson v. Winterson*, 147 N. Y. 652; *Schaser v. State*, 36 Wis. 429; *Shaffer v. Russell*, 28 Utah 444.

14. *Morrow v. State*, 56 Tex. Cr. R. 519, 120 S. W. R. 491.

15. *Carter v. Com. (Ky.)*, 13 S. W. R. 921.

the redirect examination.¹⁶ But where this class of testimony is brought out on the cross-examination it is not prejudicial error to allow the same class of testimony on the redirect examination to explain it.¹⁷ This is a matter, however, which rests in the discretion of the court.¹⁸ Thus, the fact that part of a hearsay conversation is brought out on cross-examination does not entitle the adverse party to bring out the rest of it on the redirect examination.¹⁹ But where facts are brought out on the cross-examination which tend to impeach the credibility of the witness, counteracting testimony is admissible on the redirect examination although such testimony is otherwise irrelevant.²⁰ Thus, where a witness testifies on his cross-examination that he came from jail, he may state on his redirect examination the charge upon which he was committed.²¹

§ 78. Repetition of testimony not usually allowable.—Ordinarily, a witness should not be al-

16. *Ellis v. State*, 152 Ind. 326, 52 N. E. R. 82; *Levels v. St. Louis, etc., Ry. Co.*, 196 Mo. 606, 94 S. W. R. 275; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. R. 668.

17. *Chicago, etc., Ry. Co. v. Griffith*, 44 Neb. 690, 62 N. W. R. 868; *Mahoning Ore., etc., Co. v. Blomfelt*, 163 Fed. R. 827, 91 C. C. A. 390; *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. R. 687.

18. Cases cited in foot-note 17.

19. *Wagner v. People*, 30 Mich. 384; *McCracken v. West*, 17 Ohio, 16.

20. *Alpine v. State*, 117 Ala. 93, 23 So. R. 130; *State v. Lyons*, 113 La. 959, 37 So. R. 890; *People v. Johnson*, 106 Cal. 289, 39 Pac. R. 622.

21. *State v. Ezell*, 41 Tex. 35.

lowed, on his redirect examination, either to repeat or amplify the testimony given by him on his direct examination.²² But where a witness, on his cross-examination, is led to modify a statement made by him on his direct examination, it is proper to attempt to show on his redirect examination that his former statement is correct.²³ Moreover, it is not prejudicial error for a witness to repeat on his redirect examination an answer given by him to a question propounded on his cross-examination.²⁴

§ 79. Change of conduct and reasons therefor.—Where a witness testifies on his cross-examination concerning certain conduct manifested by him, he may be asked on his redirect examination to state the reasons for such conduct.²⁵ And where he testifies on his cross-examination concerning a change in his conduct from what it formerly had been, he may be asked on his redirect examination to state the reasons for the change.²⁶

§ 80. Identification of writing.—Where a witness on his cross-examination is asked to identify certain entries in a document, and the entries are

22. *Marquette Cement Mfg. Co. v. Williams*, 230 Ill. 26, 82 N. E. R. 424; *Baker v. Sherman*, 71 Vt. 439, 46 Atl. R. 57; *Alabama Steel, etc., Co. v. Thompson*, 166 Ala. 460, 52 So. 75; *Lauchheimer v. Jacobs*, 126 Ga. 261, 55 So. R. 55.

23. *People v. Tubbs*, 147 Mich. 1, 110 N. W. R. 132.

24. *Alabama City, etc., Ry. Co. v. Sampley*, 169 Ala. 372, 53 So. R. 142.

25. *People v. Glover*, 141 Cal. 233, 74 Pac. R. 745.

26. *Baxter v. Abbott*, 7 Gray (Mass.) 71.

not offered in evidence, the adverse party is not entitled, on the redirect examination, to introduce the document in evidence.²⁷ But where the witness is cross-examined concerning the contents of a document the adverse party may question him, on the redirect examination, concerning the document.²⁸

§ 81. **Leading questions.**—Leading questions are not excluded on the redirect examination, but much less freedom is allowed in the use of them than on cross-examination. In refreshing the memory of the witness, his attention may be called to prior conversations concerning subject-matter testified to by him on his cross-examination, and to the times and places at which they occurred.²⁹ And where new matter is brought out on the cross-examination, leading questions are allowable where the purpose is to have the witness explain or modify his testimony.³⁰

§ 82. **Discretion of the trial court.**—As regards the scope of the redirect examination the trial judge has large discretion.³¹ He may con-

27. *People v. Van Ewan*, 111 Cal. 144, 43 Pac. R. 520; *Fremont Butter, etc., Co. v. Peters*, 45 Neb. 356, 63 N. W. R. 791.

28. *Missisquoi Bank v. Evarts*, 45 Vt. 293; *Vaughan v. McCarthy*, 63 Minn. 221, 65 N. W. R. 249.

29. *Farrel v. Boston*, 161 Mass. 106, 36 N. E. R. 751; *Gilbert v. Sage*, 57 N. Y. 639.

30. *Chicago v. Sutton*, 136 Ill. App. 221.

31. *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. R. 1075; *Noel v. State*, 161 Ala. 25, 49 So. R. 824; *Concord Apart. House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. R. 1038.

fine it strictly within the scope of the cross-examination, or permit it to be extended beyond it.³² The fact that he allows new matter to be brought out on the redirect examination is not prejudicial error.³³

§ 83. **The recross-examination.** — Ordinarily, a recross-examination is not allowed.³⁴ This is owing to the fact that the adverse party is required to exhaust his cross-examination of the witness in the first instance.³⁵ But where new matter is introduced on the redirect examination the adverse party may be allowed to recross-examine the witness. This is a matter, however, which rests in the discretion of the court.³⁶ But where new matter is brought out on the redirect examination which does not tend to explain or rebut testimony already given by the witness the adverse party is entitled to recross-examine him.³⁷

The recross-examination, when allowed, should be restricted to matters concerning which

32. *Manuf., etc., Bank v. Koch*, 105 N. Y. 630, 12 N. E. R. 9; *State v. Lyons*, 113 La. 959, 37 So. R. 890.

33. *Treadwell v. State*, 168 Ala. 96, 53 So. R. 290; *Springfield v. Dalby*, 139 Ill. 34, 29 N. E. R. 860; *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. R. 272.

34. *Troup v. State*, 160 Ala. 125, 49 So. R. 332.

35. *Troup v. State*, *supra*.

36. *Brown v. State*, 72 Md. 468, 20 Atl. R. 186; *State v. Haab*, 105 La. 230, 29 So. R. 725; *Atl. & D. R. Co. v. Rieger*, 95 Va. 418, 28 S. E. R. 590.

37. *Wood v. McGuire*, 17 Ga. 303.

the witness has already testified.³⁸ Moreover, it should not extend to matters to which he might have testified on his cross-examination.³⁹

§ 84. Impeachment of witnesses. In general.—There are four chief modes of impeaching the credibility of a witness. These four modes are as follows: (1) By a skillful cross-examination. (2) By contradictory testimony of other witnesses. (3) By proving statements made by him out of court inconsistent with his statements on the witness stand. (4) By showing by other witnesses that his general reputation for veracity is bad.

§ 85. Presumption of credibility.—Ordinarily, when a witness takes the stand a presumption exists that he will state the truth. Some courts treat this presumption as one of law,⁴⁰ while other courts hold the contrary.⁴¹ As regards the credibility of witnesses, however, there is no such thing as legal equality.⁴² Jurors, in determining the weight of testimony, may give consideration to the demeanor of a witness, and

38. *Hoover v. State*, 161 Ind. 348, 68 N. E. R. 591; *State v. Heidelberg*, 120 La. 300, 101 N. W. R. 105; *Stutsman v. Sharpless*, 125 Ia. 335, 101 N. W. R. 105.

39. *Mechanics' Bank v. Woodward*, 73 Conn. 470, 47 Atl. R. 762.

40. *Pereira v. Star Sand Co.*, 51 Oreg. 477, 94 Pac. R. 835; *Comstock v. Rayford*, 12 Sm. & M. (Miss.) 369.

41. *Stix v. Keith*, 85 Ala. 455, 5 So. R. 184.

42. *Brethauer v. Schorer*, 81 Conn. 143, 70 Atl. R. 592.

other circumstances observed by them during the trial.⁴³

§ 86. What witnesses may be impeached.—Any witness who testifies in a case is subject to be impeached. This rule is applicable to parties to the suit, both in civil⁴⁴ and criminal⁴⁵ cases, as well as to other parties. It is applicable to a merely nominal party to the suit.⁴⁶ Also to an accomplice.⁴⁷ Moreover, where a defendant in a criminal case takes the stand in his own behalf a liberal rule is allowed.⁴⁸

§ 87. Party may not impeach his own witness.—As a general rule, the party who calls a witness may not impeach him.⁴⁹ This rule is ap-

43. *Howard v. Louisville Ry. Co.*, (Ky.) 105 S. W. R. 932, 32 Ky. L. Rep. 309.

44. *Wefel v. Stillman*, 151 Ala. 249, 44 So. R. 203; *Barnes v. Loomis*, 199 Mass. 578, 85 N. E. R. 862.

45. *People v. Gray*, 135 Mich. 542, 98 N. W. R. 261; *Parb v. State*, 143 Wis. 561, 128 N. W. R. 65; *State v. Hubbard*, 223 Mo. 80, 122 S. W. R. 694; *Clinton v. State*, 58 Fla. 23, 50 So. R. 580; *Kirklin v. State*, 168 Ala. 83, 53 So. R. 253.

46. *Carey v. Henderson*, 61 Ill. 378.

47. *State v. Hardin*, 46 Ia. 623, 26 Am. Rep. 174; *McGruder v. State*, 71 Ga. 864.

48. *Southworth v. State*, 52 Tex. Cr. R. 532, 109 S. W. R. 133.

49. *Johnston v. Marriage*, 74, Kan. 208, 86 Pac. R. 461, 87 Pac. R. 74; *Becker v. Koch*, 104 N. Y. 394, 10 N. E. R. 701, 58 Am. Rep. 515; *Chicago City Ry. Co. v. Gregory*, 221 Ill. 591, 77 N. E. R. 1112, 6 Ann. Cas. 220; *State v. Fletcher*, 127 La. 602, 53 So. R. 877; *Western Union Tel. Co. v. Northcutt*, 158 Ala. 539, 48 So. R. 553, 132 Am. St. Rep. 38. See also, for full discussion of this subject, 21 L. R. A. 418-433. Also, 82 Am. St. Rep. 57, and 60 Am. Dec. 749-752.

plicable to the state in a criminal prosecution.⁵⁰ The basis of the rule is the presumption that the party who calls the witness vouches for his veracity. There are, however, some exceptions to this rule. Thus, where a party to the suit is obliged to call a certain witness, as in the case of a subscribing witness to a will, or other document, he may impeach him.⁵¹ Also where the prosecuting attorney in a criminal case is required by the law of the state to call all witnesses capable of giving testimony which would elucidate the case.⁵² As said by Dr. Greenleaf, "Where the witness is not one of the party's own selection, but is one whom the law obliges him to call, such as a *subscribing witness to a deed or a will*, or the like; here he can hardly be considered as the witness of the party calling him, and therefore, as it seems, his character for truth may generally be impeached."⁵³

§ 88. Same. Inconsistent statements out of court.—Whether or not a party may show that his own witness made statements out of court inconsistent with those testified to by him on the stand is a question upon which the authorities do not agree. This difference of opinion exists in this country, and formerly existed in England

50. *State v. Keefe*, 54 Kan. 197, 38 Pac. R. 302; *Carr v. State*, 43 Ark. 99; *State v. Cox*, 151 N. C. 698, 66 S. E. R. 128.

51. *Newell v. White*, 29 R. I. 343, 73 Atl. R. 798; *Smith v. Utesch*, 85 Ia. 381, 52 N. W. R. 343; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. R. 899.

52. *State v. Slack*, 69 Vt. 486, 38 Atl. R. 311.

53. *Greenl. on Evid.*, § 443.

until the question was settled by a statute.⁵⁴ In some jurisdictions of this country also the question has been settled by statute. In the absence of statute, according to the great weight of authority the party who calls the witness may not discredit him by showing the inconsistent statements made by him out of court.⁵⁵ This rule was the weight of authority in England prior to the English statute on the subject, and it is still the rule there, except where the party who calls the witness proves that the latter is adverse to him. The statutes of this country upon the subject are practically similar to the English statute. They usually provide that where the witness is adverse to the party who has called him, or surprises, entraps or deceives him, the inconsistent statements made by the witness out of court may be shown by other witnesses.⁵⁶ In some states, however, they are broader than in other states.⁵⁷

§ 89. Calling the adverse party or his wit-

54. 17 & 18 Vict., ch. 125; 28 & 29 Vict., ch. 18. See also, Steph. Dig. of Evid., art. 130.
55. *Smith v. Dawley*, 92 Ia. 312, 60 N. W. R. 625; *Westhal v. Ry. Co.*, 134 Mich. 239, 96 N. W. R. 19; *Dixon v. State*, 86 Ga. 754; *Adams v. Wheeler*, 97 Mass. 67; *Richards v. State*, 82 Wis. 172, 51 N. W. R. 652.
56. *Mercer v. State*, 41 Fla. 279, 26 So. R. 317; *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. R. 677; *Richardson v. State*, 100 Ga. 391, 33 S. E. R. 639; *Thiele v. Newman*, 116 Cal. 571, 48 Pac. R. 713.
57. *Manning v. Carberry*, 172 Mass. 432, 52 N. E. R. 521; *Adams v. State*, 156 Ind. 596, 59 N. E. R. 24; *State v. Bloor*, 20 Mont. 574, 52 Pac. R. 611.

nesses to the stand.—Where one of the parties to a suit calls the adverse party as a witness he may not impeach him directly.⁵⁸ He may, however, draw from his testimony any inferences that may fairly be drawn from it.⁵⁹ And where he calls a witness of the adverse party to testify to certain facts he may not impeach him.⁶⁰ Moreover, the adverse party who first called him may not impeach him,⁶¹ unless his first material testimony is given on behalf of the other party.⁶²

Where a witness is summoned by one party, but is not examined by him, and the adverse party calls him to the stand, the party who summons him may impeach him.⁶³ But the party who examines him may not impeach him, although he is summoned by the other party.⁶⁴

58. *Black v. Epstein*, 221 Mo. 286, 120 S. W. R. 754; *O'Neil v. Adams*, 144 Ia. 385, 122 N. W. R. 976; *Sawyer v. Moyer*, 109 Ill. 461; *Dravo v. Fabel*, 132 U. S. 487, 10 S. Ct. 170, 33 L. ed. 421.

59. *Black v. Epstein*, *supra*; *McLean v. Clark*, 31 Fed. R. 501.

60. *Richards v. State*, *supra*; *Com. v. Hudson*, 11 Gray (Mass.) 64; *Craig v. Grant*, 6 Mich. 447. See also, note, 21 L. R. A. 418.

61. *Johnston v. Marriage*, *supra*; *State v. Taylor*, 88 N. C. 694; *Baltimore, etc., Ry. Co. v. State*, 107 Md. 642, 69 Atl. R. 439, 72 Atl. R. 340.

62. *Finé v. Interurban St. Ry. So.*, 45 Misc. (N. Y.) 587, 91 N. Y. Suppl. 43. See also, *Hall Incorp. Town of Manson*, 99 Ia. 698, 68 N. W. R. 922.

63. *Milton v. State*, 40 Fla. 251, 24 So. R. 60; *Neil v. Childs*, 32 N. C. 195; *Bebee v. Tinker*, 2 Root (Conn.) 160.

64. *Boston v. State*, 86 Neb. 114, 125 N. W. R. 144; *Musick v. Ray*, 3 Metc. (Ky.) 427.

The principles involved in this case are also applicable to depositions which are taken by one of the parties to the suit and used by the other party.⁶⁵

§ 90. Impeaching a witness by showing his general reputation.—The terms “character” and “reputation” are not literally synonymous, but in this connection they are quite generally used interchangeably. Character, in its exact sense, is the peculiar inherent quality, or aggregate of qualities, impressed by nature, habit or education, by which a person or thing is distinguished from others. While general reputation is the character *imputed* to a person or thing, by the public, in the community in which he or it lives.

A witness of the adverse party may be impeached by showing that his general reputation, in the community in which he lives, is bad. This rule is applicable to all witnesses who testify in a case.⁶⁶ It applies to a party to the suit in a civil case,⁶⁷ and to the defendant in a criminal case.⁶⁸ It also applies to the prosecuting witness.⁶⁹

65. *Bloomington v. Osterlie*, 139 Ill. 120, 28 N. E. R. 1068; *Music v. Ray*, *supra*.

66. *People v. Palmer*, 105 Mich. 568, 63 N. W. R. 656; *Fields v. State*, 121 Ala. 16, 25 So. R. 726.

67. *Hofacre v. Monticello*, 128 Ia. 239, 103 N. W. R. 488; *Duffy v. Radke*, 138 Wis. 38, 119 N. W. R. 811.

68. *State v. Greenburg*, 59 Kan. 404, 53 Pac. R. 61; *State v. Priest*, 215 Mo. 1, 114 S. W. R. 949; *Com. v. Bonner*, 97 Mass. 587; *People v. Soeder*, 150 Cal. 12, 87 Pac. R. 1016;

§ 91. **Time and place of reputation.**—It is not essential that the impeaching witness live in the community in which the party resides.⁷⁰ Nor is it essential that the latter is at present residing in the community in which the general reputation in question exists.⁷¹ Nor is it essential to confine the inquiry to the present time.⁷² It may be shown that the reputation was of long standing.⁷³ The testimony, however, must tend to prove the party's present character.⁷⁴ If the time is too remote the testimony should be ex-

Sweatt v. State, 156 Ala. 85, 47 So. R. 194; People v. De-Camp, 146 Mich. 533, 109 N. W. R. 1047.

69. State v. Blackburn, 136 Ia. 743, 114 N. W. R. 531; White v. State, 114 Ala. 10, 22 So. R. 111.

70. Hadjo v. Gooden, 13 Ala. 718 (12 miles distant); Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422 (20 miles distant); Wallis v. White, 58 Wis. 26.

71. Coates v. Sulau, 46 Kan. 341; Sage v. State, 127 Ind. 5; State v. Knight, 118 Wis. 417, 95 N. W. R. 390.

72. Coates v. Sulau, *supra*; State v. Knight, *supra*; (2 years; extended discussion); State v. Miller, 156 Mo. 76, 56 S. W. R. 907; State v. Fry, 96 Tenn. 467, 35 S. W. R. 383 (6 years); Watkins v. State, 82 Ga. 231, 8 S. E. R. 875, 14 Am. St. Rep. 155 (8 years).

73. State v. Miller, 156 Mo. 76, 56 S. W. R. 907.

74. People v. Mix, 149 Mich. 260, 112 N. W. R. 907, 12 Ann. Cas. and note.

75. State v. Reed, 53 Kan. 767, 37 Pac. R. 174, 42 Am. St. Rep. 322 (15 years); Sage v. State, 127 Ind. 15 (7 years); State v. Potts, 78 Ia. 656 (6 years); Baker v. Com. 106 Ky. 212, 50 S. W. R. 54, 20 Ky. L. Rep. 322 (15 years); Wood v. Mathews, 73 Mo. 477 (3 years); Miller v. Miller, 187 Pa. St. 572, 41 Atl. R. 277 (4 years).

cluded.⁷⁵ This is a matter which rests in the sound discretion of the court.⁷⁶

Personal acquaintance of the impeaching witness with the party is not essential.⁷⁷ But a mere stranger who goes into the community to learn his general reputation is not qualified to testify against him.⁷⁸

As regards the place to which the inquiry may relate, this is a matter which depends upon the circumstances of the particular case.⁷⁹ The rule, generally speaking, is quite flexible. As said in the Texas case cited: "Upon authority and sound principles, we think it may safely be said that where the evidence of a witness is such that it fairly raises the issue of his veracity, or where the testimony of other witnesses relating to his character at or near the time of the trial to impeach his character for truth and veracity, or in case the person whose character is in issue has removed beyond the jurisdiction of the court, or has been transient, so that he has no fixed and known residence for a time sufficient to make a reputation for truthfulness, resort may be had to evidence of the reputation of such witness at the place of his former residence, and at a time remote from the time of trial. No definite rule

76. *Ruse v. Page*, 32 Minn. 111, 19 N. W. R. 736, 20 N. W. R. 95; *Snow v. Grace*, 29 Ark. 131.

77. *State v. Turner*, 36 S. C. 534.

78. *Haley v. State*, 63 Ala. 83; *Reid v. Reid*, 17 N. J. Eq. 101.

79. *Brown v. Perez*, 89 Tex. 282, 34 S. W. R. 725; *In re Brown*, 143 Ia. 649, 120 N. W. R. 667.

can be stated which will apply to all cases." Where a witness has changed his place of residence from time to time, his reputation in the various communities in which he has resided may be shown, provided the time is not too remote.⁸⁰ The mere fact that he resided in a community a comparatively short time does not render this class of evidence inadmissible, provided he acquired a reputation while living there.⁸¹ But a reputation acquired in a place where he has never lived,⁸² or in which he visited but a short time, may not be shown.⁸³

§ 92. **Scope of general reputation.**—In most of the states this class of impeaching testimony is confined to general reputation for truth and veracity.⁸⁴ This rule also obtains in the federal courts.⁸⁵ In several of the states, however, the

80. *Watkins v. State*, 82 Ga. 231, 8 S. E. R. 875, 14 Am. St. Rep. 155; *Hauk v. State*, 148 Ind. 238, 46 N. E. R. 127, 47 N. E. R. 465; *People v. Mix*, 149 Mich. 260, *supra*; *In re Brown*, *supra*; *State v. Cushenberry*, 157 Mo. 168, 56 S. W. R. 737.

81. *State v. Cushenberry*, *supra*.

82. *Combs v. Com.*, 97 Ky. 24, 29 S. W. R. 734, 16 Ky. L. Rep. 699.

83. *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. R. 27 (3 months).

84. *Com. v. Williams*, 209 Pa. St. 529, 58 Atl. R. 922; *Dungan v. State*, 135 Wis. 151, 115 N. W. R. 350; *Missouri, etc., Ry. Co. v. Creason*, 101 Tex. 335, 107 S. W. R. 527; *Maloy v. State*, 52 Fla. 101, 41 So. R. 791; *Hoffman v. State*, 93 Md. 338, 49 Atl. R. 658; *Laclede Bank v. Keller*, 109 Ill. 385.

85. *United States v. White*, 28 Fed. Cas. No. 16, 675, 5 Cranch C. C. 38.

impeaching testimony may extend to the general moral character of the witness. This view obtains in Missouri, Tennessee, Kentucky, Iowa, California, Indiana, Alabama, Arkansas, Idaho, Louisiana and North Carolina.⁸⁶ It also obtains in England.⁸⁷ And it has been recognized in New York.⁸⁸

Where the accused in a criminal case takes the stand in his own behalf he may not be impeached by showing that his general moral character is bad, unless he has put it in issue.⁸⁹ But his general reputation for truth and veracity may be shown as in the case of any other witness.⁹⁰

§ 93. Testimony as to particular facts inadmissible.—The credibility of a witness may not

86. *State v. Barnet*, 203 Mo. 640, 102 S. W. R. 506; *Peek v. State*, 86 Tenn. 259, 6 S. W. R. 389; *Smith v. Com.*, 109 Ky. 685, 60 S. W. R. 531, 22 Ky. L. Rep. 1349; *State v. Blackburn*, 136 Ia. 743, 114 N. W. R. 531; *People v. Walker*, 140 Cal. 153, 73 Pac. R. 831; *Dotterer v. State*, 172 Ind. 357, 88 N. E. R. 689; *Lowman v. State*, 161 Ala. 47, 50 So. R. 43; *Kincaid v. Price*, 82 Ark. 20, 100 S. W. R. 76; *State v. Anthony*, 6 Ida. 383, 55 Pac. R. 884; *State v. Guy*, 106 La. 8, 30 So. R. 268; *State v. Boswell*, 13 N. C. 209.

87. *Rex v. Bispham*, 4 C. & P. 392, 19 E. C. L. 569.

88. *Calkins v. Colburn*, 10 N. Y. St. 778.

89. *People v. Hinkman*, 192 N. Y. 421, 85 N. E. R. 676; *Clinton v. State*, 53 Fla. 98, 43 So. R. 312, 12 Ann. Cas. 150.

90. *State v. Buffington*, 71 Kan. 804, 81 Pac. R. 465, 4 L. R. A. N. S. 154; *Kilgore v. State*, 124 Ala. 24, 27 So. R. 4; *State v. Priest*, 215 Mo. 1, 114 S. W. R. 949; *Ball v. United States*, 147 Fed. R. 32, 78 C. C. A. 126.

be impeached by testimony as to particular facts.⁹¹ Thus, testimony is inadmissible to show particular acts of immorality;⁹² instances of intoxication,⁹³ etc. Nor may the credibility of a witness be impeached by showing that he associated with lewd and unchaste women;⁹⁴ or that he was given to "rows";⁹⁵ or is reputed to be a horse thief;⁹⁶ or was indicted for perjury;⁹⁷ or is an habitual litigant.⁹⁸ The credibility of a female witness may not be impeached by proving particular acts of unchastity;⁹⁹ or by showing that

91. *Deck v. Ry. Co.*, 100 Md. 168, 59 Atl. R. 650, 108 Am. St. Rep. 399; *People v. Wilson*, 133 Mich. 517, 99 N. W. R. 6; *State v. Nelson*, 101 Mo. 464; *Gates v. Bowers*, 169 N. Y. 14, 61 N. E. R. 993; *Lowman v. State*, 161 Ala. 47, 50 So. R. 43; *Dunn v. State*, 162 Ind. 174, 70 N. E. R. 521; *Com. v. McLaughlin*, 12 Mass. 449.
92. *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. R. 726; *State v. Rogers*, 108 Mo. 202, 18 S. W. R. 976; *In re Gird*, 157 Cal. 534, 108 Pac. R. 499, 137 Am. St. Rep. 131.
93. *Hoge v. People*, 117 Ill. 35, 6 N. E. R. 796; *People v. Gray*, 148 Cal. 507, 83 Pac. R. 707; *State v. Nelson*, 101 Mo. 464.
94. *Hudson v. State*, 41 Tex. Cr. R. 453, 55 S. W. R. 492, 96 Am. St. Rep. 789; *State v. Jackson*, 44 La. Ann. 160, 10 So. R. 600.
95. *Briggs v. Com.*, 82 Va. 554.
96. *Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142.
97. *Bennett v. State*, 47 Tex. Cr. R. 52, 81 S. W. R. 30; *Johnson v. Com. (Ky.)*, 61 S. W. R. 1005, 22 Ky. L. Rep. 1885.
98. *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 30 N. E. R. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136.
99. *People v. O'Hare*, 124 Mich. 515, 83 N. W. R. 279; *Perry v. State*, 149 Ala. 40, 43 So. R. 18; *State v. Romero*, 117 La. 1003, 42 So. R. 482.

she associates with a man of bad character,¹⁰⁰ or even that she is a common prostitute.¹ "By a notorious want of chastity, a female will certainly obtain a bad character, and her general reputation, if she has acquired any, may be given in evidence to impeach her; but not the particular and independent fact that she is a prostitute, or keeps a house of ill-fame."²

On the cross-examination, however, the credibility of a witness may be impeached by testimony of particular facts. Thus, a female witness may be asked on cross-examination whether she is a prostitute;³ whether she has kept a house of ill-fame;⁴ or lived in adultery;⁵ or been the kept mistress of a given man;⁶ or has given birth to an illegitimate child.⁷ A witness may refuse, of course, to answer incriminating questions.⁸

The credibility of a witness may not be impeached by showing by other witnesses that he

100. *Western, etc., Ry. Co. v. Vaughan*, 113 Ga. 354, 38 S. E. R. 851.¹

1. *People v. Chin Hane*, 108 Cal. 597, 41 Pac. R. 697; *Tucker v. Tucker*, 74 Miss. 93, 19 So. R. 955, 32 L. R. A. 623.

2. *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8, 8 So. R. 142, 24 Am. St. Rep. 748.

3. *McVey v. State*, 55 Neb. 777, 76 N. W. R. 438; *Brittain v. State*, 47 Tex. Cr. R. 597, 85 S. W. R. 278.

4. *State v. Hack*, 118 Mo. 92, 23 S. W. R. 1089.

5. *Tla-koo-yel-lee v. United State*, 167 U. S. 274, 17 S. Ct. 855, 42 L. ed.

6. *Exon v. State*, 33 Tex. Cr. R. 461, 26 S. W. R. 1088.

7. *Exon v. State*, *supra*; *Campbell v. State*, 23 Ala. 44.

8. *Zanone v. State*, 97 Tenn. 101, 36 S. W. R. 711, 35 L. R. A. 556.

is a "sporting man";⁹ or has the reputation of being a quarrelsome person;¹⁰ or has the reputation of being dishonest;¹¹ or that his saloon has a bad reputation;¹² or that he is a spiritualist;¹³ or has the reputation of being a horse thief;¹⁴ or has intemperate habits;¹⁵ or is a dangerous person when intoxicated;¹⁶ or is reputed to be guilty of a particular offense.¹⁷

The unchastity of a female witness may not be proved by other witnesses where the purpose is to impeach her credibility. But where the question of her chastity is material to the issue, such testimony is admissible. Thus, in a prosecution for rape, indecent assault, etc., the character of the prosecutrix for chastity is in issue, and testimony upon this point is admissible.¹⁸

Whether or not the reputation of a male witness for unchastity is admissible to impeach his

9. *Kalteyer v. Mitchell*, (Tex. Civ. App. 1908), 110 S. W. R. 462.
10. *State v. Richardson*, 194 Mo. 326, 92 S. W. R. 649; *Padron v. State*, 41 Tex. Cr. R. 548, 55 S. W. R. 827.
11. *Calkins v. Ann Arbor Ry. Co.*, 119 Mich. 312, 78 N. W. R. 129; *State v. Guy*, 106 La. 8, 30 So. R. 268.
12. *Opper v. Davega*, 126 N. Y. App. Div. 941, 111 N. Y. Suppl. 521.
13. *Blaisdell v. Raymond*, 9 Abb. Pr. (N. Y.) 178, note.
14. *Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142.
15. *Hoitt v. Moulton*, 21 N. H. 586.
16. *State v. Nelson*, 101 Mo. 464.
17. *State v. Hown*, 107 N. C. 810.
18. *People v. Wilson*, 133 Mich. 517, 99 N. W. R. 6; *Com. v. Churchill*, 11 Metc. (Mass.) 538, 45 Am. Dec. 229; *State v. Morse*, 67 Me. 428.

credibility is a question upon which the decisions are not harmonious. Some answer it in the affirmative,¹⁹ and some in the negative.²⁰

§ 94. Impeaching credibility by showing conviction of crime.—The credibility of a witness may be impeached by showing that he has been convicted of a crime,²¹ provided the conviction is not too remote.²² Ordinarily, however, the conviction must be of a felony,²³ or of an infamous crime,²⁴ or of a crime which involves

19. *People v. Mills*, 94 Mich. 630; *State v. Shroyer*, 104 Mo. 441, 16 S. W. R. 286, 24 Am. St. Rep. 344.
20. *State v. Sibley*, 131 Mo. 519, 33 S. W. R. 167; *State v. Coffey*, 44 Mo. App. 455.
21. *Clifford v. Pioneer Fire-Proofing Co.*, 232 Ill. 150, 83 N. E. R. 448 (rape); *State v. Carter*, 121 Ia. 135, 96 N. W. R. 710; *Dotterer v. State*, 172 Ind. 357, 88 N. E. R. 689 (assault); *Rollings v. State*, 160 Ala. 82, 49 So. R. 329; *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. R. 788; *People v. Soeder*, 150 Cal. 12, 87 Pac. R. 1016.
22. *Bogus v. State*, 55 Tex. Cr. C. 126, 114 S. W. R. 823, 131 Am. St. Rep. 804 (15 years); *State v. Kent*, 5 N. D. 516, 67 N. W. R. 1052, 35 L. R. A. 518 (20 years); *Linz v. Skinner*, 11 Tex. Civ. App. 512, 32 S. W. R. 915 (embezzlement; 10 years). *Contra*, *State v. Farmer*, 84 Me. 436, 24 Atl. R. 985 (selling intoxic. liquor; 27 years).
23. *Davidson v. Watts*, 111 Va. 394, 69 S. E. R. 328; *People v. Gray*, 148 Cal. 507, 83 Pac. R. 707; *Hayden v. Com.*, 140 Ky. 634, 131 S. W. R. 521.
24. *Smith v. State*, 129 Ala. 89, 29 So. R. 699, 87 Am. St. Repl. 47; *McLean v. Chicago*, 127 Ill. App. 489; *McKevitt v. People*, 208 Ill. 460, 70 N. E. R. 693 (sentenced to state reformatory).

moral turpitude.²⁵ As a general rule, conviction of a mere misdemeanor,²⁶ which is not infamous in its nature,²⁷ or which does not involve moral turpitude,²⁸ may not be shown. As said in a California decision, "If, in any case, a record of conviction of a misdemeanor is admissible for the purpose of discrediting, it should be made to appear that the offense involved moral turpitude or infamy."²⁹

An infamous crime has been defined as one which "shows such depravity in the perpetrator, (or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath."³⁰

The fact that an appeal is pending does not render testimony of the conviction inadmis-

25. *Sue v. State*, 52 Tex. Cr. R. 122, 105 S. W. R. 804; *Ford v. State*, 92 Ga. 459, 17 S. E. R. 667. See also, *State v. Wormser*, 129 N. Y. App. Div. 596, 113 N. Y. Suppl. 1093.

26. *Andrews v. State*, 118 Ga. 1, 43 S. E. R. 852; *State v. Smith*, 125 Mo. 2, 28 S. W. R. 181 (assault and battery); *Utle v. Merrick*, 11 Metc. (Mass.) 302 (false pretenses).

27. *State v. Donnelly*, 130 Mo. 642, 32 S. W. R. 1124 (gambling); *Matzenbaugh v. People*, 194 Ill. 108, 62 N. E. R. 546, 88 Am. St. Rep. 134 (fraudulent schedule of taxable property).

28. *Eads v. State*, 17 Wyo. 459, 101 Pac. R. 946 (carrying concealed weapon); *Webb v. State*, 47 Tex. Cr. R. 306, 83 S. W. R. 394 (card playing); *Gillman v. State*, 165 Ala. 136, 51 So. R. 722 (assault and battery).

29. *People v. Carolan*, 71 Cal. 195, 196, 12 Pac. 52.

30. *Smith v. State*, 129 Ala. 89, 29 So. R. 699, 87 Am. St. Rep. 47.

sible.³¹ Where, on appeal, a conviction has been set aside and a new trial granted, and the accused is subsequently acquitted, some courts hold that testimony of the conviction is inadmissible,³² while other courts hold the contrary.³³ The fact that the witness was pardoned after his conviction does not render testimony of his conviction inadmissible.³⁴

Some courts hold that the credibility of a witness may be impeached by showing his lack of religious belief,³⁵ while other courts hold the contrary.³⁶

§ 95. Unchastity of prosecutrix in rape case. In England, and in some of the states of this country, the prosecutrix in a rape case may be asked on cross-examination whether she had prior sexual intercourse with men other than the accused. The witness, however, according to the English rule, may refuse to answer.³⁷ And, according to the English rule, if her answer

31. *Viberg v. State*, 138 Ala. 100, 35 So. R. 53, 100 Am. St. Rep. 22; *Hackett v. Freeman*, 103 Ia. 296, 72 N. W. R. 528.

32. *Pigott v. Lilly*, 55 Mich. 150, 20 N. W. R. 879.

33. *Early v. State*, 56 Tex. Cr. R. 492, 120 S. W. R. 431.

34. *Gallagher v. People*, 211 Ill. 158, 71 N. E. R. 842.

35. *Brink v. Stratton*, 176 N. Y. 150, 68 N. E. R. 148, 63 L. R. A. 182; *Searcy v. Miller*, 57 Ia. 613, 10 N. W. R. 912; *Com. v. Burke*, 16 Gray (Mass.) 33.

36. *Starks v. Schlensky*, 128 Ill. 1; *Brundige v. State*, 49 Tex. Cr. R. 596, 95 S. W. R. 527; *People v. Copsey*, 71 Cal. 548, 12 Pac. R. 721; *Dickinson v. Beal*, 10 Kan. App. 233, 62 Pac. R. 724.

37. *Rex v. Holmes*, 12 Cox C. C. 137.

is in the negative she may not be contradicted.³⁸ This is on the ground that the question is collateral to the issue. In some jurisdictions of this country, however, it has been held that she may be contradicted.³⁹ And in some jurisdictions she may be compelled to state whether she had prior connection with men other than the accused.⁴⁰ The fact that she had prior connection with the accused may be proved by her own declarations.⁴¹ And testimony is admissible in this class of cases to show habitual promiscuous intercourse with other men.⁴² Moreover, testimony that she gave birth to an illegitimate child, prior to the alleged rape, is also admissible.⁴³ But the fact that the general reputation of her parents for chastity is bad may not be shown.⁴⁴

§ 96. **General reputation for violence.**—The credibility of a witness may not be impeached by showing by other witnesses that he has a general reputation of being a violent person.⁴⁵ Nor may it be impeached by showing that he has a

38. *Rex v. Holmes, supra.*

39. *Strang v. People*, 24 Mich. 1.

40. *Rogers v. People*, 34 Mich. 345; *Shirwin v. People*, 69 Ill. 55.

41. *State v. Cook (Ia.)*, 22 N. W. R. 675.

42. *Woods v. People*, 55 N. Y. 515; *Hall v. People*, 47 Mich.; *Rex v. Martin*, 6 Car. & P. 562.

43. *Wilson v. State*, 17 Tex. App. 525.

44. *State v. Anderson*, 19 Mo. 241.

45. *Sweatt v. State*, 156 Ala. 85, 47 So. R. 194; *State v. Richardson*, 194 Mo. 326, 92 S. W. R. 649.

general reputation of being a turbulent person.⁴⁶ Thus, a ruling by the trial court that the general reputation of the prosecuting witness, in a murder case, of being a violent, dangerous and quarrelsome person, be excluded has been held not prejudicial error.⁴⁶

§ 97. **Hostility, bias, sympathy, etc.**—As previously stated, a witness may not be impeached by proving inconsistent statements made by him out of court, where such statements concern facts collateral to the issue.⁴⁷ But where the witness denies on cross-examination that he made statements out of court which manifested hostility or bias toward the adverse party he may be contradicted.⁴⁸ Moreover, by the weight of authority, the particulars or details of the cause of the hostility or bias may be shown.⁴⁹ Some courts, however, have held the contrary.⁵⁰ Where the inquiry would lead to interminable investigations the testimony should be excluded.⁵¹ Where the testimony is proper, the atten-

46. *Padron v. State*, 41 Tex. Cr. R. 548, 55 S. W. R. 827.

47. *Johnson v. Brown*, 130 Ind. 534, 28 N. E. R. 698; *North Chicago St. Ry. Co. v. Southwick*, 165 Ill. 494, 46 N. E. R. 698.

48. *Carr v. Moore*, 41 N. H. 131, *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471.

49. *Langhorn v. Com.*, 76 Va. 1012; *Polk v. State*, 62 Ala. 237.

50. *Drum v. Harrison*, 83 Ala. 384, 3 So. R. 715; *People v. Webster*, 139 N. Y. 73, 34 N. E. R. 730.

51. *State v. Dee*, 14 Minn. 27.

tion of the witness should be directed to the time and the place of making the hostile statements.⁵²

The matter of hostility or bias on the part of a witness toward the adverse party may be brought out on cross-examination, or shown by other witnesses.⁵³

§ 98. **Same. Cross-examination.**—In attempting to show, on cross-examination, hostility or bias of the witness, great latitude is allowable. Thus, counsel may ask a witness for the prosecution if there is an understanding that in case the accused is convicted he is to receive a reward.⁵⁴ A witness may be asked if he has staked a bet on the decision of the case;⁵⁵ whether he or his wife has an interest in the subject-matter of the suit;⁵⁶ whether he has agreed to pay the attorney fees of the party who summoned him.⁵⁷ A female witness may be asked on cross-examination if she has had improper relations with a party to the suit,⁵⁸ and whether the deceased was not her lover.⁵⁹

§ 99. **Opinion testimony as to credibility of**

52. *Langhorne v. Com.*, *supra*; *Davis v. State*, 51 Neb. 301, 70 N. W. R. 984.

53. *People v. Anderson*, 105 Cal. 32, 38 Pac. R. 513; *Swett v. Shumway*, *supra*; *People v. Webster* 139 N. Y. 73, 34 N. E. R. 730.

54. *Taylor v. United States*, 89 Fed. Rep. 954.

55. *People v. Parker*, 137 N. Y. 535, 32 N. E. R. 1013.

56. *Renonx v. Geney*, 65 N. Y. Supp. 508.

57. *Magruder v. State*, 35 Tex. Cr. R. 214, 33 S. W. R. 233.

58. *Martin v. State*, 125 Ala. 64, 28 So. R. 92.

59. *People v. Worthington*, 105 Cal. 166, 38 Pac. R. 689.

witness.—Ordinarily, the personal opinion of an impeaching witness, as to the credibility of the witness sought to be impeached, is inadmissible. But, both in England and in this country, after the impeaching witness has testified to the general reputation of the witness sought to be impeached, he may state, based upon that general reputation, whether or not he would believe him on oath.⁶⁰

§ 100. Number of impeaching witnesses.—The number of impeaching witnesses that may testify against the credibility of a witness of the adverse party is a matter which rests in the sound discretion of the court.⁶¹

§ 101. Effect of impeachment.—The weight to be given impeaching testimony is a matter which rests with the jury. Hence the court may properly refuse to instruct them that the testimony of the witness impeached should be disregarded.⁶²

§ 102. Sustaining testimony.—For the purpose of sustaining the credibility of a witness testimony is inadmissible unless his credibility

60. *Hamilton v. People*, 29 Mich. 173, 185 (full discussion of subject); *Bogle's Executors v. Kreitzer*, 46 Pa. St. 465; *People v. Wend.* (N. Y.) 309, 315; *Knight v. House*, 29 Md. 194.

61. *Bissell v. Cornell*, 24 Wend. (N. Y.) 354; *Bunnell v. Butler*, 23 Conn. 65.

62. *Funderburg v. State*, 100 Ala. 36, 14 So. R. 877; *Bran v. Campbell*, 86 Ind. 516; *Johnson v. State*, 129 Wis. 146, 108 N. W. R. 55.

has been impeached.⁶³ But where his credibility has been attacked, either directly,⁶⁴ or on cross-examination,⁶⁵ testimony is admissible to sustain him. And in such case it is not essential that the impeaching testimony offered be successful.⁶⁶ But where the witness is asked on cross-examination whether he has been convicted of a crime, and he answers in the negative, a sufficient basis for sustaining testimony is not created.⁶⁷ On the other hand, proof that he has been convicted of a felony, or of a crime involving moral turpitude or infamy, is a sufficient basis for the introduction of sustaining testimony.⁶⁸ But proof of mere bias on the part of the witness is not sufficient.⁶⁹ Nor is the mere fact that statements made by him on the stand create doubt as to his credibility.⁷⁰ But where

63. *Johnson v. State*, 129 Wis. 146, 108 N. W. R. 55; *Funderburg v. State*, 100 Ala. 36, 14 So. R. 877.

64. *State v. People*, 85 N. Y. 390; *State v. Tawney*, 78 Kan. 855, 99 Pac. R. 268; *Watson v. State*, 155 Ala. 9, 46 So. R. 232; *Bartlesville First Nat. Bank v. Blakeman*, 19 Okla. 106, 91 Pac. R. 868, 12 L. R. A. N. S. 364.

65. *Warfield v. Louisville, etc., Ry. Co.*, 104 Tenn. 74, 55 S. W. R. 304, 78 Am. St. Rep. 911.

66. *Com. v. Ingraham*, 7 Gray (Mass.) 46, 49. But see *Harrington v. Lincoln*, 4 Gray (Mass.) 563, 64 Am. Dec. 95.

67. *Birmingham R., etc., Co. v. Ellard*, 135 Ala. 433, 33 So. R. 276.

68. *Kraimer v. State*, 117 Wis. 350, 93 N. W. R. 1097; *Gertz v. Fitchburg Ry. Co.*, 137 Mass. 77, 50 Am. Rep. 285.

69. *Shields v. Conway*, 133 Ky. 35, 117 S. W. R. 340.

70. *Brown v. Mooers*, 6 Gray (Mass.) 451; *Rogers v. Moore*, 10 Conn. 13.

the testimony of a party to the suit tends to degrade the character of a witness of the adverse party, and thus impeach his credibility, testimony is admissible to sustain the witness impeached.⁷¹ But attacks by counsel of the adverse party on the veracity of witness do not constitute a sufficient basis for the introduction of sustaining testimony.⁷²

Where the impeaching testimony consists of inconsistent statements made by the witness out of court, some courts hold that sustaining testimony of good character is admissible,⁷³ while other courts hold the contrary.⁷⁴ Moreover, in such case, some courts hold that the witness may be sustained by showing prior statements made by him out of court consistent with those made by him on the stand,⁷⁵ while other courts hold the contrary.⁷⁶ Upon this point the courts are in hopeless conflict. The latter view seems to be supported by the weight of authority. "We find the decided weight of authority to be, that proof

71. *State v. Speritus*, 191 Mo. 24, 90 S. W. R. 459.

72. *Ricks v. State*, 19 Tex. App. 308.

73. *Tonns v. State*, 111 Ala. 1; *Stratton v. State*, 45 Ind. 468; *Berryman v. Cox*, 73 Mo. App. 67.

74. *State v. Rice*, 49 S. C. 418, 41 Am. St. Rep. 816, 27 S. E. R. 422; *Webb v. State*, 29 Ohio St. 351; *Russell v. Coffin*, 8 Pick. (Mass.) 143.

75. *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. R. 157; *Wallace v. Grizzard*, 114 N. C. 488, 19 S. E. R. 760.

76. *McKelton v. State*, 86 Ala. 594, 6 So. R. 301; *State v. Vincent*, 24 Ia. 570, 95 Am. Dec. 753; *Dufresne v. Wise*, 46 Wis. 290, 1 N. W. R. 59.

of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of the cause, is, as a general rule, inadmissible, even after the witness has been impeached or discredited, and we are satisfied with the correctness of the rule."⁷⁷

§ 103. **Scope of sustaining testimony.**—The scope of admissibility of sustaining testimony, where a proper basis exists for its introduction, is rather broad. It has, however, limitations. Sustaining testimony is admissible to show the good reputation of the witness for truth and veracity,⁷⁸ and also to show his good character generally.⁷⁹ Even particular facts may be shown to sustain the witness.⁸⁰ And testimony is admissible to show that he has reformed.⁸¹

The personal opinion of a sustaining witness, based upon his own personal knowledge⁸² of the witness impeached, or on dealings⁸³ with him, is inadmissible.

Testimony by a sustaining witness that he has never heard anything against the witness im-

77. *Gates v. The People*, 14 Ill. 434.

78. *Helton v. State*, (Tex. Cr. App. 1909), 125 S. W. R. 21.

79. *Tilley v. State*, 167 Ala. 107, 52 So. R. 732; *State v. Woodworth*, 65 Ia. 141, 21 N. W. R. 490; *Barnwell, Hannegan*, 105 Ga. 396, 31 S. E. R. 116.

80. *Gleason v. Williams*, Tapp. (Ohio) 174.

81. *Carter v. Com.* (Ky., 1890), 13 S. W. R. 921; *Central R., etc., Co. v. Dodd*, 83 Ga. 507, 10 S. E. R. 206.

82. *Lee v. Andrews*, 151 Mich. 5, 114 N. W. R. 672.

83. *Jackson v. State*, 106 Ala. 12, 17 So. R. 333.

peached is admissible, provided the circumstances show that probably he would have heard or known of his bad character had it existed.⁸⁴

§ 104. **Personal opinion of sustaining witness based upon general reputation.**—As previously stated, an impeaching witness, after testifying to the general reputation of a witness sought to be impeached, may state whether or not, based upon that general reputation, he would believe him on oath. So a sustaining witness, after testifying to the general reputation of a witness sought to be impeached, may state whether or not, based upon that general reputation, he would believe him on oath.⁸⁵ In both cases, however, the opinion must be based upon the general reputation of the witness sought to be impeached.⁸⁶

84. *Spencer v. State*, 132 Wis. 509, 112 N. W. R. 462, 122 Am. St. Rep. 989, 13 Ann. Cas. 969; *State v. Nelson*, 58 Ia. 208, 12 N. W. R. 253; *State v. Lambert*, 104 Me. 394, 71 Atl. R. 1092, 15 Ann. Cas. 1055.

85. *Doner v. People*, 92 Ill. App. 43.

86. *Doner v. People*, *supra*.

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